Nov 5. Argd M. H. Irwin Esq

6 Cr

1 Otto 423

Oct. Dec. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~310~~. 60

THEODORE A. KENDIG, APPELLANT,

vs.

THOMPSON DEAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED NOVEMBER 27, 1875.

6 Cal. 399

1 Dec. 328 Ellock

SUPREME COURT OF THE UNITED STATES.

No. 319.

THEODORE A. KENDIG, APPELLANT,

vs.

THOMPSON DEAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

INDEX.

	Original.	Print.
Style of suit	1	1
Style of court	2	1
Index	3	1
Bill of complaint	4	1
Exhibit A to bill	8	2
Bond for costs	9	2
Summons	10	3
Return on summons	11	3
Demurrer, filed March 27	12	3
Oath to demurrer	13	4
Orders of court	14	4
Demurrer, filed May 25	14½	4
Oath to demurrer	15	5
Order of court overruling demurrer	16	5
Answer	17	6
Oath to above answer	43	13
Exhibit A	44	13
B	45	14
C (mortgage deed)	46	14
D	53	16
E (military order)	59	18
Rules of military commission	61	19
F, Petition to civil commission	68	21
Jurat to above petition	77	23
Copy of note A	78	24
Copy of mortgage B	79	24
Copy of note C	86	26
Copy of mortgage D	88	27
Acknowledgment to mortgage D	94	28

	Original.	Print.
Exhibit, summons (of civil commission)	95	29
Marshal's return on summons	96	29
Publication and proof	97	29
Affidavit of Fitch	98	30
Answer of Kendig	99	30
Demurrers of defendant	106	32
Amended answer	110	33
Demurrer to amended answer	113	34
Replication	117	35
Affidavit of W. S. Holman	121	36
Letter of R. B. Brown	123	37
Motion and order of court	124	38
Rejoinder of defendant	125	38
Agreement of parties	128	39
Order of court	129	39
Execution	136	41
Orders of court and order of sale	136	41
Advertisement	146	44
Return on order of sale	147	44
Order for transfer of stock	151	45
Order to file supplemental bill (district judge)	153	46
Agreement of counsel and deposition of Cook	154	46
Interrogatories to Yerger and Cook and answers	155	47
Agreed facts	156	47
Order giving leave to file replication	160	49
Final decree; appeal prayed	161	49
Appeal granted	162	49
Appeal bond approved	163	50
Clerk's certificate	167	50

1 THEODORE A. KENDIG
vs.
THOMPSON DEAN. } No. 11. Equity docket.

In the United States circuit court for the sixth judicial circuit and western district of Tennessee.

Number 11. Equity.

2, 3 Proceedings had in the circuit court of the United States for the western district of Tennessee, at a regular term of said court, begun and held for its May term, A. D. 1875, at the Federal court-room in said city of Memphis, in said district, on, to wit, June the 22nd day, 1875, honorable Connolly F. Trigg, U. S. district judge, presiding in said circuit court.

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } No. 11. Equity docket.

4 *Bill of complaint.—Filed Dec'r 8, 1865.*

In the circuit court of the United States for the district of West Tennessee, sitting at Memphis.

To the judge of s'd court:

Theodore A. Kendig, who is a citizen of the State of Tennessee, complains, that on the 22nd day of March, A. D. 1862, he became and was the owner of 184 shares of the capital stock of the Memphis Gas-Light Company, the par value of each share of which stock was $100, & the actual value of which exceeds $20,000, & which company is a body corporate, capable to sue & be sued by the laws of Tennessee.

The name of your orator was, on that day, entered on the
5 proper books of the company as the owner, and so stood until the fraudulent transfer of the same, to be hereafter stated.

On the s'd 22nd day of March, 1862, a certificate in regular form & according to the prescribed mode of the charter of the company was issued to your orator by the proper officer of the company, which certificate is herewith exhibited as part of this bill, marked "Exhibit A."

Further complaining, your orator states that afterwards, the precise time being unknown to your orator, but which on information & belief he states was about the day of July, 1862, M'r Thompson Dean, who is a citizen of the State of Ohio, obtained possession of the books & control of the offices of the company, and being so in possession
6 and control wrongfully & fraudulently procured and obtained to be made a transfer upon the books of the company to his own name, as owner, & from the name of your orator, the said 184 shares of stock, & the issuance to him of a certificate of said stock & the cancellation of the certificate of his stock, belonging to & in the name of your orator.

Such transfer was obtained & made without the authority or consent of your orator, & without any purchase or transfer from him, or any compensation to him therefor, & without any valid right or lawful authority of any kind.

The whole proceedings, actings, & doings of said Dean, & of the officers of the company, in the premises were wrongful & fraudulent, & so intended & designed, against your orator.

All which is injurious to your orator & relievable in chancery.

7 Wherefore your orator prays that said Dean may be made a party defendant to this bill of complaint, and be compelled to answer the several allegations thereof, and that the said capital stock may be restored to your orator, and deemed to be of his property; and that all right and title thereto may be divested out of said Dean & vested in your orator; and that said Dean may be compelled to cause & authorize the transfer of said stock to be made on the books of the company to your orator, and may be enjoined from making or authorizing to be made a transfer of any of the stock to any other person; and that other suitable relief may be granted to your orator. And may writs of subpœna, injunction, issue, etc.

And your orator will pray, &, etc.

SMITH & KETRIDGE,
Sol'rs for Compl't.

8 UNITED STATES OF AMERICA,
District of West Tennessee:

Personally appeared the above-named Theodore A. Kendig, and made oath that the facts stated in the foregoing bill are true in substance and in fact, as therein stated.

T. A. KENDIG.

Sworn & subscribed before me this 8th day of Dec., 1865.

ISAAC MORRISON,
U. S. Com'r.

EXHIBIT A.

MEMPHIS GAS-LIGHT CO.

No. 502.

Shares one hundred dollars each.

$18,400.00.

MEMPHIS, *March 22nd*, 1862.

This is to certify that F. A. Kendig is the owner of one hundred & eighty-four shares of stock in the Memphis Gas-Light Company, which have been paid in full, transferable only on the books of this company.

JA'S M. WILLIAMSON,
President.

W'M H. FITCH, J'r, *Secretary.*

9 *Cost bond.—Filed December 8th*, 1865.

UNITED STATES OF AMERICA,
District of Tennessee:

We, Theodore A. Kendig & W'm H. Kendig, acknowledge ourselves indebted to Thompson Dean in the sum of two hundred and fifty dollars.

The condition of the above obligation is such that whereas the said Theodore A. Kendig has this day filed an original bill in the United States circuit court for the district of West Tennessee against s'd Thompson Dean: Now, if the said complainant, Theodore A. Kendig, shall pay & satisfy to said Thompson Dean all such costs & damages as may be adjudged against him in said cause, then the above obligation to be void; otherwise to remain in full force & effect. Witness our hands and seals this 8th day of Dec., A. D. 1865.

T. A. KENDIG. [SEAL.]
W. H. KENNEDAY. [SEAL.]

10 Signed, sealed, and acknowledge' before me & approved by me.

ISAAC MORRISON,
U. S. Com'r.

Summons.—Issued on the 8th day of December, 1865.

The President of the United States of America to the marshall of the district of West Tennessee, greeting:

You are hereby commanded to summon Thompson Dean, a citizen of the State of Ohio, if he be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit for the district of West Tennessee, at Memphis, on the first Monday in March next, and then and there to answer the bill of complaint of Theo-
11 dore A. Kendig, a citizen of the State of Tennessee, filed against him in s'd court, and to do further & receive what the said court shall order and decree in the premises.

Herein fail not, & have you then & there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday in September, in the year 1865, & of the Independence of the United States the 90th.

[SEAL.]

A. S. MITCHELL, *Clerk.*
ISAAC MORRISON,
D. Clerk of s'd Court.

Return.

Come to hand December 8th, 1865, and executed on Thompson Dean, with a copy of bill & subpœna.

M. T. RYDER,
Marshall.

12 *Demurrer.—Filed March 27*, 1866.

In the circuit court of the United States for the district of West Tennessee.

THEODORE A. KENDIG
vs.
THOMPSON DEAN } In chancery.

Now comes the said defendant, and not confessing all or any of the matters in said complainant's bill to be true, as therein set forth, demurs to said bill, & for cause of demurrer shows:

That the said complainant, by his said bill, has not made such a case as entitles him in a court of equity to any relief against him, the said defendant.

Wherefore the said defendant demurs thereto, and prays the judgment of this honorable court whether he shall make any further answer to said bill; and he prays to be dismissed, &c.

W'M S. HOLMAN,
Solicitor for the Deft.

13 W'm S. Holman, counsel for the defendant in the above cause, says that in his opinion the above demurrer is well founded in law.

March 26, 1866.

W'M S. HOLMAN.

W'm S. Holman, counsel for the above-named defendant, being duly sworn, says that the defendant is not a resident of the State of Tennessee, and is not as affiant verily in said State, but is, as he verily believes, in the city of New York, to which city he was called about the 13th day of March, 1866, by the sickness of a member of his, the said defendant's, family.

He further says that the foregoing demurrer is not interposed for delay.

W'M S. HOLMAN.

Sworn to and subscribed before me this 27th March, 1866.

ISAAC MORRISON,
U. S. Com'r.

14 *Order.—March* 27, 1866.

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } In equity.

Now comes the parties by counsel, and the defendant files his demurrer to the said compl't's bill, to which the compl'ts objects & excepts, and after argument thereof by counsel the same is taken under advisement and day is given, &c.

Order sustaining demurrer.—Entered March 28, 1866.

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } In equity.

Now comes the parties by their counsel, and the court being sufficiently advised in the premises, sustains the demurrer heretofore filed by the said defendant to the said complainant's bill, with leave to the said complainant to amend the same, and day is given, &c.

14½ *Demurrer.—Filed* 26 *May*, 1866.

In the circuit court of the United States for the district of West Tennessee.

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } In equity.

Now comes the said defendant Thompson Dean, defendant aforesaid,

and by protestation, not confessing any or all of the matters and things in said complainant's bill contained to be true in such manner and form as the same are therein set forth, demur to said bill, & for cause of demurrer shows, that the said complainant has not by his said bill made such a case as entitles him in a court of equity to any relief touching any of the matters in said bill complained of.

Wherefore and for divers other good causes of demurrer appearing in said bill, the defendant demurs thereto, and he prays judgment of
15 this honorable court whether he shall be compelled to make any other or further answer to said bill. And he prays to be dismissed with his reasonable costs in this behalf sustained.

THOMPSON DEAN,
By W'M S. HOLMAN,
His Att'y.

STATE OF NEW YORK,
City and County of New York:

Before me the undersigned, a notary public within and for said city, this day personally came the above-named defendant Thompson Dean, who being by me duly sworn, say that the foregoing demurrer is not filed for the purpose of delaying said cause, and further says not.

T. DEAN.

Subscribed and sworn to before me on this the 15th day of May, 1866, by the said Thompson Dean.

In witness whereof I have hereunto set my hand and notarial seal on the day and year above written.

[SEAL.]

THO. SADLER,
Notary Public.

I, William S. Holman, an attorney for the said defendant in
16 said cause, do state that in my opinion the foregoing demurrer is well taken, and that the same is not filed for delay.

May, 1866.

W'M S. HOLMAN,
Def't's Att'y.

Order overruling demurrer.

THURSDAY, *March* 19, 1868.

THEODORE A. KENDIG
vs.
THOMPSON DEAN.

On this day came on to be heard the defendant's demurrer to complainant's bill, and the same being considered and the matters of law arising hereon fully understood by the court, it is ordered by the court that said demurrer be overruled. And on application time until June rules is given to the defendant to file his answer herein, but not to delay the hearing.

17 *Answer.—Filed April* 30, 1868.

In the circuit court of the United States for the district of West Tennessee.

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } In chancery.

The answer of Thompson Dean, the defendant, to the bill of complaint of Theodore A. Kendig, the complainant.

The said defendant, reserving all exceptions which might be taken to the compl't's bill, for answer thereto says, that it is not true that said 184 shares of stock were fraudulently transferred to him as charged in said bill; but he states the truth to be, that on the 11th day of July, 1861, James H. Pepper assigned to one Benjamin May thirty shares of the stock mentioned in said bill, and on the 20th day of the same month and year one hundred and fifty-four shares of the said stock, in
18 all one hundred and eighty-four shares of the stock of the said Memphis Gas Light Company, being the same shares of stock mentioned in said complainant's bill, the par value of each of which shares defendant admits was one hundred dollars.

He further says that nothing whatever was paid by said Benjamin May for said stock, but the said May on receiving the said assignment of said thirty shares made and delivered to said Pepper the written obligation under seal herewith filed and made a part of this answer and marked "Exhibit A," by which the said May promised to pay to said Pepper the sum of three thousand dollars, with interest, at the rate of six per cent. per annum from date until paid, out of the nett receipts of earnings on the same of three thousand dollars of the Memphis Gas Light Company, said sum and interest being payable in quarter-annual instalments, the interest being first paid, and the balance of said nett receipts then to be applied upon the principal, which said instal-
18½ ments shall amount to such sums of money as shall be equal to the quarterly nett receipts of earnings on three thousand dollars of the capital stock of said company. To which instrument is attached the following conditions:

"This note and obligation being given for the purchase-money of three thousand dollars of the capital stock of said company, sold and transferred to me by said Pepper, and if I fail to pay any of said instalments quarterly as aforesaid, after the receipt by said company of said nett earnings, then the full sum of three thousand dollars with interest, less interest and instalments paid, shall become due & payable."

And on the 20th day of July, 1861, the said May made and delivered to the said Pepper another instrument of writing under seal of the exact tenor and effect of the instrument aforesaid, except as to the date and amount for the payment of the sum of fifteen thousand four hundred dollars to the said Pepper, and therein stating that the same "was given for the purchase-money of fifteen thousand and four hundred dol-
lars of the capital stock of said company, sold and transferred by
19 said Pepper to said May," which said last mentioned instrument is herewith filed and made a part of this answer marked "Exhibit B."

And on the said 20th day of May, 1861, the said Benjamin May executed and delivered to said Pepper two certain other instruments in

writing, both bearing date the 20th day of July, 1861, and duly signed and sealed by the said May and acknowledged by him before John P. Tuzevant, clerk of the county court of Shelby County, in the State of Tennessee, and recorded in the register's office of said county on the 22d day of July, 1861, by the first of which the said May sells and conveys (as the said instrument purports) to said Pepper, his heirs & assigns, so much of his, the said May's, undivided interest, title, and estate in the property and premises belonging to the Memphis Gas Light Company, describing the same (the property so described being the property
20 of said company), as is equal to three thousand dollars of the capital stock of said company, and conditioned that the same should be void if the said May should pay to the said Pepper the said obligation for three thousand dollars hereinbefore set forth according to the tenor and effect thereof.

And by the other of said instruments the said May purported to sell & convey to said Pepper so much of his undivided interest and title in the property of said company as was represented by and equal to fifteen thousand and four hundred dollars of the capital stock of said company, with a condition that the same should be void if said May should pay to said Pepper the said obligation for the payment of fifteen thousand and four hundred dollars hereinbefore set forth according to the tenor and effect thereof, both of said conditional instruments being of exactly the same tenor except as to the amount therein specified, and both of which are herewith filed and made a part of this answer & marked "Exhibit C" and "Exhibit D," respectively.

21 The said defendant further says that he was in fact the owner of the said one hundred and eighty-four shares of stock; that the said Pepper held the same as trustee for him, and that that fact was known by the said May at the time he received from the said Pepper the assignment thereof; that said Pepper was the secretary of said company, and being greatly alarmed by the preparations which were then being made by persons then residing in the s'd city of Memphis and elsewhere to wage war upon the Government of the United States, and being anxious to leave said city on account of the hostile attitude then being assumed by such citizens of said city and others and return to the city of Covington, in the State of Kentucky, where he had previously resided. And this defendant being at the time at the city of Cincinnati, Ohio, of which city he was a resident, the said Pepper was induced to make the said assignment of said 184 shares of stock to the said
22 May, who was at the time a director of said company, and received from him the instruments of writing aforesaid, than which there was no other consideration whatever for said assignments. And this defendant expressly says and charges that at the time aforesaid the said May, who was a citizen of the city of Memphis, was actually engaged in encouraging the insurrection aforesaid, by reason of which said Pepper was induced, in his anxiety to leave said city of Memphis, to make said assignments and to receive said instruments by way of securing, if possible, the rights and interests of this defendant in the premises; and which instruments the said Pepper assigned and delivered to this defendant immediately afterwards at Cincinnati, Ohio.

This defendant further says that after the said stock was so assigned to the said May he, the said May, received from the company the following sums of money as the nett earnings of said 184 shares of the stock of said company, viz: On the 18th day of December,
23 1861, the sum of fourteen hundred and seventy-two dollars, being two quarterly dividends on said stock (the dividends on the stock

of said company, by rules and regulations thereof, being declared quarter-annually), and on the 17 day of March, 1862, the further sum of eighteen hundred & forty dollars accrued in like manner, being the nett earnings of said 184 shares for the preceeding quarter of a year, the nett earning of each of said 184 shares being the same.

And this defendant avers that said May did not pay, either to said Pepper or to this defendant, the said sums so by him received from said company, or any part thereof, but wholly failed and neglected so to do.

And this defendant further avers that neither the said May, nor any person on his behalf, nor the said Kendig has ever paid, either to said Pepper or to this defendant, any sum of money whatever. or paid any consideration whatever, on or for the stock aforesaid, or on or
24 for any part thereof, or on *or on* account of the instruments of writing aforesaid, or on account of the said instalments of the earnings of said stock.

This defendant therefore submits to this honorable court that said transaction between said Pepper and said May, by which said stock was assigned to said May, was unconscionable, because in fact there was no consideration for said assignments and no mutu*b*ility of rights in the contracts; and that said May having failed to comply with the terms thereof, a court of equity ought not to aid him to redeem the stock so by him forfeited.

He further says that he accepted from said Pepper the assignment of said instruments executed to him by said May, because in the then condition of the country intercourse between the State of Ohio and the city of Memphis, being suspended by the rebellion, no other course was available.

He further says that, after said May had received from said
25 company the said earnings of said stock, to wit, on the 20th day of March, 1862, he assigned the said 184 shares of stock on the books of said company to said complainant, a true copy of which assignment is herewith filed, marked "Exhibit H," and made a part of this answer.

And he expressly says & charges that said Kendig, who, during all the time aforesaid was a resident and citizen of said city of Memphis, received the said assignment of said stock with full knowledge of all the foregoing facts; and he further says that the said Kendig has never at any time paid or tendered to said Pepper or to this defendant any sum of money whatever for or on account of said stock, or for the payment of or on account of the said instruments & obligations made and delivered as aforesaid by said May to said Pepper, or for or on account of the principal or interest of the sums therein mentioned.

26 This defendant admits that it is true that he obtained the control of the books and affairs of said company, but he expressly denies the charge in said complainant's bill, "that being so in possession and control" he "procured and obtained to be made on the books of the company to his own name as owner, and from the name of said complainant the 184 shares of stock," and while this defendant expressly denies said charge as wholly untrue, he says that the truth is that while the said city of Memphis was held and occupied by persons in arms against the Government of the United States, he as a loyal citizen of the United States was not able to visit said city of Memphis; that after the military forces of the United States took possession of said city, to wit, on the 9th day of December, 1862, he, having a large interest in said company, independent of said 184 shares, and a majority of the directors of said company being engaged in or favoring the re-

bellion, was by order of Major-General Hulburt of the Army of
27 the United States, then commanding military forces in said city,
placed in control of said company and its affairs, but that afterwards, to wit, on the 28 day of Febr'y, 1863, said company having elected directors loyal to the United States, they elected Jas. M. Williamson president, and W'm H. Fitch, j'r, secretary of said company, who have ever since held said offices, directors having from thence hitherto been regularly elected annually, in pursuance with the law chartering said company, by the stockholders thereof; and the said transfer was made, as the said Kendig well knew, in the manner hereinafter stated.

This defendant further says that, while claiming that said transaction between said Pepper and said May was unconscionable and injurious to his rights, and that whatever right said May or said complainant as his assignee had acquired thereby, had been forfeited by the said failure to comply with the terms thereof, yet being desirous to improve
28 by a large expenditure of money, *by a large expenditure of money*, the value of the stock of said company by increasing the capacity of the works of the company, and being anxious to quiet and determine his title to said 184 shares of stock, he instituted the proceedings hereinafter mentioned.

And this defendant says that on the 6th day of June, 1862, on which day the military forces of the United States took possession of the said city of Memphis, the civil government of said State of Tennessee and the courts of justice of said State, & especially of said city of Memphis, and of the western district of said State, had been and were totally suspended and overthrown by the rebellion of the citizens of said State and of other States against the Government of the United States. That in the absence of any civil tribunal in said city or district, by which the rights of citizens of the United States might be protected and enforced, Brigadier-General James C. Veatch, an officer of the Army of the United States, then in command of the military district of Memphis, in
29 the State of Tennessee, which district embraced the said city of Memphis, by order of Maj. General Hurlbut, an officer of the Army of the United States, then commanding the military department in which said district was situated, by a special order, No. 247, dated and issued on the 25th day of April, 1863, organized for said district a court called a "civil commission, to hear and determine all suits and complaints instituted by loyal citizens of the United States for the collection of debts, the enforcement of contracts, the prevention of frauds, the recovery of the possession of property, real or personal, and generally to perform such duties and exercise such powers as can be done by a court deriving its powers from military authority"; and further providing by said order that said commission should adopt such rules and regulations for the transaction of business as should be found necessary, subject to the approval of the general commanding the
30 district, "all judgments, decrees, and orders to be reported to the general commanding the district for approval." And by said order detailed and appointed Capt. Barbour Lewis, 1st Missouri Cavalry, judge, Joseph Williams and A. C. Ketchum, esq., all loyal citizens of the United States, as commissioners under said order, and all of whom were immediately sworn to support the Constitution of the United States and to faithfully perform the duties of their said appointment, and entered upon the discharge thereof at said city, the said Captain Barbor Lewis being the president of said commission; and the said general commanding said district at the same time detailed and appointed

Lieutenant John C. Grierson, 6th Illinois Volunteer Cavalry, recorder, and Beverly Searcy, a loyal citizen of the United States, marshal of said commission, who were in like manner duly sworn and entered upon the duties of their appointment.

31 And the said civil commission being so organized, adopted certain rules and regulations for the transaction of business under said order, which rules were approved by the said officer commanding said district of Memphis:

A copy of which order and the rules adopted (which, among other things, provide in substance that the mode of proceedure before said commission should conform as near as might be done to the laws, rules, and practice of the courts of Tennessee,) by said commission, with the approval thereof by said commanding officer, are herewith filed and made a part of this answer, and marked "Exhibit E."

And the defendant says that the said civil commission, so organized, was for more than one year after the organization thereof & during the whole period during which the proceedings hereinafter mentioned were pending, the only court or civil tribunal for the administration of justice and possessing or exercising the general powers of a court of record

32 in said city of Memphis or in the district of West Tennessee, and that said civil commission did during all of said period exercise and perform the duties and judicial functions conferred by said order, and from day to day during said period, heard and determined causes, pronounced judgments, and caused the same, through the order of the said commanding officer, to be carried into execution as fully and completely as a court possessed of the powers conferred by said order might or could do; and did through their said recorder keep a full and complete record of their judgments, orders, and proceedings as a court of record, which record is preserved in said city.

And this defendant is informed, and verily believes, that all of the judgments, orders, and proceedings of said commission were submitted to and approved by the military officer of the United States commanding said district.

And this defendant further says, that on the 1st day of Sep-

33 tember, 1863, for the purpose hereinbefore mentioned, he filed his petition in the said court of said civil commission then sitting in the city of Memphis, against the said Benjamin May and the said complainant, Theodore A. Kendig, setting forth in his said petition in substance the facts hereinbefore set forth in reference to the execution of said instruments in writing executed by said May to said Pepper, and setting forth said instruments and the default of said May in the performance of said contract, and the failure of said May or of said Kendig to pay to said Pepper or this defendant the sums of money equal to the quarterly nett earnings of s'd stock by him, said May, received from said company, or any other sum whatever, and treating the said instruments marked Exhibits C & D, respectively, as mortgages on said 184 shares of stock to secure the payment of said sum of eighteen thousand and four hundred dollars, and alleging that every part thereof remained unpaid, he, the said defendant, in his said petition prayed for a fore-

34 closure of said mortgages and for the sale of said 184 shares of stock to satisfy the amount due him on said obligations of said May, or that said stock should be assigned to him at its par value in satisfaction of said demand and for all other further, different, or additional relief that justice might require in the premises, the said petition alleging that the said May had assigned to said Kendig the said 184

shares of stock on the books of said company subject to the payment of said $18,400.

On which petition such proceedings were had before said commission that the said May, who had left the State of Tennessee and gone within the military lines of persons who were then waging war against the Government of the United States, was duly notified by proper publication of the pendency of said suit in conformity with the rules and regulations of said commission; and the said Kendig, the complainant herein, was duly served with the summons issued by said commission in
35 said cause by a personal service thereof, and a default having been entered in said action against the said May, and the said Kendig having on the 19th day of October, 1863, filed his answer to said petition, and the said defendant having on the said 19th day of October, 1863, filed a replication to the answer of the said Kendig, to which replication the said Kendig on the 21st day of October, 1863, filed his rejoinder, by which issues were joined between this defendant and the said Kendig on the matters in controversy in said cause, being in effect and as to the subject-matter the identical same matters involved in and presented by said complainant's bill of complaint.

And afterwards, to wit, on the 24th day of October, 1863, the said cause was, by the said parties, Theodore A. Kendig, the complainant aforesaid, and this defendant, submitted to said commission in open court, and the said parties having agreed before said commission that this defendant had received as the nett earnings of said stock
36 while he was in the military possession of the affairs of said company the sum of eighteen hundred and forty dollars ($1,840), the said commission found that that sum should be deducted from the amount due on said instruments executed by said May to said Pepper; and the said court of civil commission thereupon, to wit, on the said 24th day of October, 1863, pronounced a final judgment in said cause, in substance—

That the facts set up in said petition were true. That there was due said defendant from said May, on the instruments in writing and as the purchase-money of said stock, the sum of nineteen thousand and seventy-eight dollars and thirty-three cents. That the said Kendig had received an assignment of said stock from said May subject to the payment of the amount due on the purchase-money thereof from said May. That the conditions of said mortgages were forfeited by the failure and default of said May, and that stock ought to be sold to pay the sum
37 so found due to this defendant from said May.

It was further adjudged by said court that unless the said defendants to that suit, viz, the said May and Kendig, should pay to this defendant the sum so found due him from said May, that the right in equity of each of them to redeem the said stock should be barred and forever foreclosed; and that this defendant should have an execution or order of sale issued to the marshal of said commission for the sale of said 184 shares of stock, or so much thereof as might be necessary to pay and satisfy the amount so found due to this defendant, the said judgment and decree specifying the manner in which and the notice on which the same should be sold.

And the said commission further ordered that said complainant, Kendig, should pay of the costs of said proceeding (being the costs of his defence made therein) the sum of fifteen dollars and fifty cents.
38 And this defendant expressly states that afterwards, to wit, on the 14th day of November, 1863, at said city of Memphis, Brigadier-General James C. Veatch, an officer of the Army of the United

States, and then still in command of the district of Memphis aforesaid, did as such commanding officer approve of the said judgment, order, and proceedings of said civil commission in said cause, and did order that the said judgment be carried into execution.

This defendant further says that on the 16 day of November, 1863, the said Benjamin May and the said Theodore A. Kendig, having failed to pay any part of the said sum so found due to this defendant from said May, the said recorder issued an execution or order of sale on said order and judgment, reciting the judgment and decree aforesaid, and the approval thereof by the said commanding officer, and commanding the said marshal of said commission to advertise and sell the said
39 one hundred and eighty-four shares of stock in pursuance with the judgment aforesaid. And that said marshal did, on the 24th day of November, 1863, after giving the notice of the time, place, and terms of said sale, as required by said order and judgment (such notice being in full compliance with the laws of the State of Tennessee in such cases), sell the said 184 shares of said stock at public sale at said city, in full conformity with the notice of the sale thereof, to one Francis Barclay, for the sum of sixty-seven dollars and fifty cents per share, being in the aggregate the sum of twelve thousand and four hundred and twenty dollars ($12,420), for said 184 shares, he, the said Barclay, being the highest and best bidder therefor, who thereupon paid to said marshal, as appears from his return to said order, said sum of money, to whom, on the said last-mentioned day, said stock was assigned by a special order, a copy of which is herewith filed and made a part
40 of this answer, and marked "Exhibit G," who afterwards, on the books of said company, assigned the same to this defendant.

All of which will fully appear by reference to the records of said civil commission, and he files herewith a full and perfect transcript and exemplification of the record of said civil commission in said cause, and of the proceedings of said marshal in making said sale, and makes the same a part of this his answer, the same being indicated as "Exhibit F."

And he further says that said proceedings were in substantial compliance with the rules of practice in such cases as established by the laws of Tennessee, as he verily believes.

That this defendant insists & relies upon the said judgment, order, and proceedings of the said civil commission, and the approval thereof by the said Brigadier-General James C. Veatch, then commanding the said Department of Memphis and the sale of said 184 shares of
41 stock under and by virtue of said judgment, order, and proceeding by the marshal of said commission, acting under and by authority of the said commanding officer of said district, and the purchase thereof by the said Barclay, and the assignment of the same to this defendant, as a full and complete bar to the complainant's bill and the matters therein set forth.

And he further says, that during all of said period, to wit, from the 6th day of June, 1862, until the said 28th day of November, 1863, when said stock was sold by said marshal and assigned to said Barclay, and for a long time thereafter, the whole of said State of Tennessee was under martial law, by virtue of the proclamation of the President of the United States, and the said district under the military command of said brigadier-general, as an officer of the Army of the United States.

This defendant therefore submits to this honorable court that,
42 in view of all the matters and proceedings hereinbefore set forth, it would be most inequitable and unjust to deprive him of the possession and ownership of said stock, the value of which has been

greatly increased by expenditures made by him; that by the inequitable and unconscionable character of the contract made by the said May with the said Pepper, and the entire failure of said May and the said complainant to comply with the terms thereof, by which, in any event, their and each of their rights therein (if any ever existed) ought to be deemed forfeited, as well as by the said sale of said stock under the proceedings aforesaid, the said complainant ought to be estopped from asserting any claim whatever to said stock.

This defendant expressly denies all wrongful or fraudulent acts in the premises as charged in said bill.

All which matters and things this defendant is ready to aver,
43 maintain, and prove as this honorable court may direct, and prays to be hence dismissed with his costs most wrongfully sustained.

THOMPSON DEAN,
Defendant,
By W. S. HOLMAN,
His Solicitor.

THE STATE OF OHIO,
Hamilton County:

Before me, the undersigned, notary public in and for said county, on this day personally came Thompson Dean, the above-named defendant, who, being by me duly sworn, says that the above and foregoing answer is true in substance and matter of fact, and further says not.

T. DEAN.

Subscribed and sworn to before me, at the city of Cincinnati, in the county and State aforesaid, on this the 11th day July, 1866.

Witness my hand and notarial seal hereunto affixed.
[SEAL.] J. WILSON JOHNSON,
Notary Public, Ham. Co., O.

44 EXHIBIT A.

$3,000.] MEMPHIS, TENNESSEE,
June 11th, 1861.

For value received, I promise to pay to the order of James H. Pepper the sum of three thousand dollars, with interest at the rate of six per cent. per annum from date until paid, out of the nett proceeds of earnings on the sum of three thousand dollars of the capital stock of the Memphis Gas Light Company, of the city of Memphis, Tennessee. Said sum and interest being payable in quarter-annual installments, the interest being first paid, and balance of said nett receipts then be applied upon the principal; which said instalments shall amount to such sums of money as shall be equal to the quarterly nett receipts of earnings on the three thousand dollars of the capital stock of said company.

This note and obligation being given for the purchase-money of three thousand dollars of the capital stock of said company sold and transferred to me by said Pepper.

And if I fail to pay any of said instalments quarterly as afore-
45 said, after the receipt by said company of said nett earnings, then the full sum of three thousand dollars with interest, less interest and installments paid, shall become due and payable.

BEN MAY. [SEAL.]

(Endorsed:)

For value received I assign the within note and obligation to Thompson Dean.

JAMES H. PEPPER.

EXHIBIT B.

$15,400.] MEMPHIS, TENNESSEE, *July* 20, 1861.

For value received, I promise to pay to the order of James H. Pepper the sum of fifteen thousand and four hundred dollars, with interest at the rate of six per cent. per annum from date until paid out of the nett receipts of earnings on the sum of fifteen thousand and four hundred dollars of the capital stock of the Memphis Gas Light Company, of the city of Memphis, Tennessee. Said sum & interest being payable in quarter-annual instalments, the interest being first paid, and bal. of said nett receipts then to be applied upon the principal, which said instalments shall amount to such sums of money as shall be equal
46 to the quarterly nett receipts of earnings on fifteen thousand four hundred dollars of the capital stock of said company.

This note and obligation being given for the purchase-money of fifteen thousand and four hundred dollars of the capital stock of said company sold and transferred to me by said Pepper.

And if I fail to pay any of said instalments quarterly as aforesaid, after the receipt by said company of said nett earnings, then the full sum of fifteen thousand and four hundred dollars with interest, less interest and instalments paid, shall become due and payable.

BEN MAY. [SEAL.]

(Endorsed:)

For value received, I assign the within note and obligation to Thompson Dean.

JAMES H. PEPPER.

Know all men by these presents that Ben May, of the city of Memphis, in the State of Tennessee, in consideration of three thousand dollars to him paid by James H. Pepper, the receipt whereof is hereby acknowledge, doth grant, bargain, sell, and convey unto said James H. Pepper, his heirs and assigns forever, the following real estate and other
47 property, viz., so much of my undivided interest, right, title, and estate in the property and premises of and belonging to the Memphis Gas Light Co. (hereinafter described) as shall be represented by, and is equal to three thousand dollars of the capital stock of said company at par; said real estate, premises, and property being described as follows, the same being in the city of Memphis, in the State of Tennessee, being all those certain lots, tracts, or parcels of land particularly described as follows, viz.: Block number four hundred and forty-eight and block number four hundred and forty-five (448 & 445), as known on the plan of said city of Memphis, and bounded by Chickasaw street on the west and by Mill street on the south. Each lot fronting one hundred and forty-eight feet and six inches on Chickasaw street, and extending back one hundred and forty-eight feet six inches from the same.

Also two other certain pieces or parcels of ground known and
48 designated on the plan of the said city of Memphis, as lots numbers four hundred and forty-six (446) and four hundred *and four hun-*

dred and forty-seven (447), fronting two hundred and ninety-seven feet on Main street and running back west to the said lots above mentioned and numbered four hundred and forty-eight and four hundred and forty-five.

Also my interest, right, title, and estate to the extent aforesaid in the gas-works' buildings, machinery, apparatus, pipes, materials, appurtenances, meters, fixtures, personal and other property of whatsoever kind or description, situated and being in and upon the premises above described or elsewhere in the said city of Memphis, and in anywise belonging or appertaining to said company or connected with said gas-works.

And all the right, title, interest, and estate to the extent afore-
49 said, of the said Ben May, either in law or equity, of, in and to the said premises and property to the extent aforesaid, together with all the privileges and appurtenances to the same belonging or in anywise appertaining, to have and to hold the same to the only proper use of the said James H. Pepper, his heirs and assigns forever.

And the said Ben May, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with said James H. Pepper, his heirs and assigns, that he has good right and lawful authority to sell the same, that the title so conveyed is clear, free, and unencumbered by any act of said Ben May, and that he will warrant and defend the same unto said James H. Pepper against all claims by or through or under him, his heirs or assigns:

Provided always, and this conveyance is made upon condition
50 that if the said Ben May shall pay or cause to paid unto the said James H. Pepper, his legal representatives or assigns, his certain promissory note and obligation according to the tenor and effect thereof, a copy of which is as follows, to wit:

$3,000.] MEMPHIS, TENNESSEE, *June* 11, 1861.

For value received I promise to pay to the order of James H. Pepper the sum of three thousand dollars, with interest at the rate of six per cent. per annum from date, until paid, out of the nett receipts of earnings, on the sum of three thousand dollars of the capital stock of the Memphis Gas-Light Company of the city of Memphis, Tennessee, said sum and interest being payable in quarter annual instalments, the interest being first paid, and balance of said nett receipts then to be applied upon the principal, which said instalments shall amount to such sums of money as shall be equal to the quarterly nett receipts of earn-
51 ings on three thousand dollars of the capital stock of said company.

This note and obligation being given for the purchase-money of three thousand dollars of the capital stock of said company sold and transferred to me by said Pepper.

And if I fail to pay any of said instalments quarterly, as aforesaid, after the receipt by said company of said nett earnings, then the full sum of three thousand dollars with interest, less interest and instalments paid, shall become due and payable.

BEN MAY. [SEAL.]

then these presents shall be void; otherwise to remain in full force and virtue.

In witness whereof I, the said Ben May, have hereunto set my hand and seal this twentieth day of July, in the year eighteen hundred and sixty-one.

BEN MAY. [SEAL.]

JNO. P. TREZEVANT, *Clk.*

STATE OF TENNESSEE,
County of Shelby:

52 Personally appeared before me, John P. Trezevant, clerk of the county court of said county, the bargainer to the foregoing and hereto attached mortgage, with whom I am personally acquainted, and who acknowledged that he executed the same for the purposes therein contained.

Witness my hand at office this 23d day of July, 1861.

JOHN P. TREZEVANT, *Clerk.*

This mortgage was filed in my office for registration on the 22d day of July, 1861, at 10 o'clock a. m., and so noted in note-book No. 5, page 45.

JA'S W. KING, *Reg'r.*

STATE OF TENNESSEE,
Shelby County:

The foregoing mortgage, together with the clerk's certificate thereon endorsed, was this day duly recorded in my office in book No. 48, pages 475, 476, & 477, July 26, 1871.

JA'S W. KING, *Register.*

(Endorsed:)
For value received I assign the within mortgage to Thompson Dean.
JAMES H. PEPPER.

53 EXHIBIT D.

Know all men by these presents that Ben May, of the city of Memphis, in the State of Tennessee, in consideration of fifteen thousand and four hundred dollars to him paid by James H. Pepper, the receipt whereof is hereby acknowledged, doth hereby grant, bargain, sell, and convey unto said James H. Pepper, his heirs and assigns forever, the following real estate and other property, viz:

So much of my undivided interest, right, title, and estate in the property and premises of and belonging to the Memphis Gas Light Company, hereinafter described, as shall be represented by and is equal to fifteen thousand and four hundred dollars of the capital stock of said company at par, said real estate, premises, and property being described as follows, the same being in the city of Memphis, in the State of Ten-
54 nessee, being all those certain lots, tracts, or parcels of ground particularly described as follows, viz:

Block number four hundred and forty-eight and block number four hundred and forty-five (448 & 445) as known on the plan of the said city of Memphis and bounded by Chickasaw street on the west and by Mill street on the south, each lot fronting one hundred and forty-eight feet and six inches on Chickasaw street and extending back one hundred and forty-eight feet six inches from the same.

Also two other certain pieces or parcels of ground known and designated on the plan of said city of Memphis as lots number four hundred and forty-six (446) and four hundred and forty-seven (447), fronting two hundred and ninety-seven feet on Main street and running back west to the said lots above mentioned and numbered four hundred and forty-eight and four hundred and forty-five.

Also my interest, right, title, and estate to the extent afore-
55 said, in the gas-works buildings, machinery, apparatus, pipes, ma-

terials, appurtenances, meters, fixtures, personal and other property of whatsoever kind or description situate and being in and upon the premises above described or situated elsewhere in the city of Memphis aforesaid, and in anywise belonging or appurtaining to said company or connected with said gas-works, and all the right, title, interest, and estate to the extent aforesaid, of the said Ben May, either in law or equity, of, in and to said premises and property to the extent aforesaid, together with all the privileges and appurtenances to the same belonging or anywise appertaining; to have and to hold the same to the only proper use of the said James H. Pepper, his heirs and assigns forever.

And the said Ben May for himself, his heirs, executors, and administrators and assigns, doth hereby covenant with said James H.
56 Pepper, his heirs and assigns, that he has good right to sell the same, that the title so conveyed is clear, free, and unencumbered by any act of said Ben May, and that he will warrant and defend the same unto s'd James H. Pepper against all claims by, through, or under him, his heirs or assigns:

Provided always, and this conveyance is made upon condition that if the said Ben May shall pay or cause to be paid unto the said James H. Pepper, his legal representatives or assigns, his certain promissory note and obligation according to the tenor and effect thereof, a copy of which is as follows, to wit:

$15,400.] MEMPHIS, TENN., *July* 20, 1861.

For value received, I promise to pay to the order of James H. Pepper the sum of fifteen thousand and four hundred dollars with interest at the rate of six per cent. from date until paid, out of the nett receipts of earnings on the sum of fifteen thousand and four *thousand* dollars of the capital stock of the Memphis Gas-Light Company of the city of Memphis, Tennessee, said sum and interest being payable in quarter annual
57 instalments, the interest being first paid, and balance of said nett receipts then be applied upon the principal, which said instalments shall amount to such sums of money as shall be equal to the quarterly nett receipts of earnings on fifteen thousand and four hundred dollars of the capital stock of said company.

This note and obligation being given for the purchase-money of fifteen thousand and four hundred dollars of the capital stock of said company, sold and transferred to me by said Pepper.

And if I fail to pay any of s'd instalments quarterly, as aforesaid, after receipts by said company of s'd nett earnings, then the full sum of fifteen thousand & four hundred dollars with interest, less interest and instalments paid shall become due and payable.

BEN MAY. [SEAL.]

then these presents shall be void; otherwise to remain in full force and virtue.

In witness whereof the said Ben May have hereunto set my hand and seal this twentieth day of July, in the year eighteen hundred & sixty-one.

BEN MAY. [SEAL.]

JOHN P. TREAZEVANT, *Clk.*

58 STATE OF TENNESSEE,
County of Shelby:

Personally appeared before me John P. Treazevant, clerk of county

court of said county, Ben May, the bargainer to the foregoing and hereto attached mortgage, with whom I am personally acquainted and who acknowledged that he executed the same for the purpose therein contained.

STATE OF TENNESSEE,
Shelby County:

The foregoing mortgage together with the clerk's certificate thereon endorsed was this day duly recorded in my office, in book No. 48, pages 477, 478, 479, July 27, 1861.

JAS. W. KING.

(Endorsed:)
For value received I assign the within mortgage to Thompson Dean.
JAMES H. PEPPER.

This mortgage was filed in my office for registration on the 22nd day of July, 1861, at 10 o'clock a. m., and so noted in note-book No. 5, page 44.

JAMES W. KING.

59 EXHIBIT E.

HEADQUARTERS DIST. MEMPHIS,
Memphis, Tennessee, Ap'l 25, 1863.

Speceal orders No. 247.

A civil commission is hereby organized for the district of Memphis, Ten., to hear and determine all complaints and suits instituted by loyal citizens of the United States for the collection of debts, the enforcement of contracts, the prevention of frauds, the recovery of the possession of property, real or personal, and generally to perform such duties and exercise such powers as can be done by a court deriving its powers from military authority.

The commission will adopt such rules and regulations for the transaction of business as may be found necessary, subject to the ap'roval of the general commanding the district.

All judgments, decrees, and orders must be approved the commanding the district for approval.

Detail for the commission.

1st. Captain Barbour Lewis, 1st Mis'ouri Cavalry.
2nd. Judge Joseph Williams.
3d. A. C. Kitchum, esq'r.

60 Lieut. John C. Grierson, 6th Illinois Vol. Cavalry.

The commission will meet in the chancery court-room, in Memphis, on Monday the 27th of April, 1863, and hold its session without regard to hours.

By order of Brig. Gen. Ja's C. Veach.

F. W. FOX,
Assistant Adjutant-General.

Purpose and powers of the commission.

For want of the usual courts of justice at Memphis or vacinity the commission is established to hear and determine as far as can be done by a court deriving its powers from military authority all suits instituted by citizens of this or other States, but loyal to the government, for the collection of debts, the enforcement of contracts, the prevention of frauds, or the fraudulent removal, conversion, or disposition of property, money, or choses in action; the settlement of disputes between partners and joint owners in property, and sharers in the profits and losses of joint-business undertakings; the preservation of the
61 assets of estates; the adjudication of controversies between landlords and tenants, and of disputed rights of possession of both real and personal property; and, generally, as far as can be done in a state of war, to adjust all such controversies between private parties as are necessary to be adjusted for the security of property and the good order and regulation of society.

Rules.

1. In conducting the business of the commission the pleadings shall be in the form of petitions and answers, sworn to, avoiding technicalities, and presenting as briefly as can be the real points in dispute; and new parties may be made by petition and answers required as the merits of the case may demand, so as to adjust the rights of all parties interested in the subject-matter of controversy.

2. Suits may be commenced by simply filing the petition with the recorder, and giving bond for costs, whereupon notice will issue, as of course, for defendants to appear and answer within three days
62 after service of the notice; but where extraordinary process, such as seizures or attachment of goods, choses in action, or money in transitu, in hands of depositaries, agents, or factors, injunctions or restraints upon the means, business, or doings and actings of defendants or other persons is desired, application must be made in writing to the commission while in session, or to one or more members when not in session, by whom orders or fiats for such extraordinary process will be made when equity and substantial justice seem prima facie to require it, addressed to the recorder, to be issued upon bond being given with sufficient security to cover all damages to the defendants or other persons, caused by the wrongful sueing out of such process. Non-residents and absent defendants may also be brought into court by publication and pro confesso be taken, or process of contempt be had for failing to appear and answer as nearly as convenient, according to the practice of courts of equity in Tennessee.

3. All testimony taken before the commission while in session
63 will be oral, but the commission may, when deemed necessary, appoint a suitable person to reduce the testimony in the case to writing, and make report thereof at such time as may be designated. Depositions may be taken according to the practice of the civil courts of the State of Tennessee, to be used as evidence in the trial of any case pending.

If either party desires the evidence of any witness brought before the commission to be in writing, it may be done by the commission sending the witness before a justice of the peace or commissioner appointed for the purpose, without delaying the trial of causes by the writing down of testimony during such trial, the party making the application paying

the extra expenses of having the testimony so taken. The commission has power to direct terms and notice on which depositions may be taken at a distance.

4. The commission will keep a correct record of all interlocutory and final orders, judgments, & decrees, filing the pleadings and written testimony, and sending correct transcripts of the pleadings and interlocutory fiats & orders and final order, judgment, or decree in
64 each case, as speedily as possible after trial, to the commanding general of the district, for his approval or final order, and for the same to be executed.

5. Reasonable compensation for the services of the members of the commission, the clerks, and all other persons necessarily employed in conducting its business, will be assessed and charged by the recorder as costs in each case to be charged to the losing party, or divided between the parties, as the commission shall in such case direct, according to the merits, subject to the approval of the commanding general.

6th. The commission may, from time to time, as seems needful, make rules for conducting its business, and the preparation and trial of causes (not inconsistent herewith, nor with the military rules and regulations of the district or department), making the modes of proceeding as simple and free from technicalities as can be for the attainment of substantial justice & equity, and making the remedies applied, as near as
65 can be done, according to the laws, and rules, and practice of the courts of Tennessee.

7th. The commission may punish for contempt, or breaches of peace or of good order in its presence while in session, or in other cases requiring it, by fine or imprisonment, or both, at its discretion; also for contumaciously refusing to perform its orders and decrees, interlocutory or final.

8th. None but those who are loyal to the government will be permitted to practice as att'ys or counsellors before the commission.

9. On the petition of loyal parties interested, the process, orders, judgments, and proceedings of judicial, ministerial, or other officers of the State, county, or city, or persons now assuming to exercise the functions of such officers, may be reviewed and examined, and when substantial justice require it, the same will be by the commission suspended, modified, or annulled, and set aside; and the commission, in all proper cases, will proceed to hear and determine the merits &
66 adjudge the remedies, the same as if the cases or suits had been first instituted before the commission.

10. In any case where it is necessary that process for the arrest of the person or seizure of the property of a party shall be issued by the commission, if any officer of the commission shall divulge the fact of such issuance to any person or persons before such arrest or seizure shall be made, the same shall be deemed a contempt of law and shall be punished as such.

11. Costs shall be charged in this commission, until otherwise ordered, at rates double those prescribed in similar cases, as near as may be, in the code of Tennessee. But such additional charge may be made in each case as shall be deemed necessary.

12. No attorney practicing before this commission shall be security on any bond for cost or otherwise in any case pending.

13. When by the answer of the defendant new matter is al-
67 leged in avoidance of the allegations of the plaintiff's petition, he shall be allowed three days' time to file his answer thereto.

Ordered, that the above and foregoing rules be and are adopted for

the practice of the commission, subject to the approval of the com'ander of this military district.

JOSEPH WILLIAMS,
BARBOUR LEWIS,
A. C. KETCHUM,
Commissioners.

Attest:

JOHN C. GRIERSEN,
Recorder.

Examined & approved.

JAMES C. VEACH,
Brig. Gen.

68 EXHIBIT F.

STATE OF TENNESSEE, *Shelby County:*

Civil commission, district of Memphis.

Be it remembered that on the 1st day September, 1863, Thompson Dean filed his certain petition herein against Benjamin May and T. A. Kendig, which together with the proceedings had in the cause are in words & figures following, to wit:

DEPARTMENT OF MEMPHIS.

THE STATE OF TENNESSEE,
City of Memphis:

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG.

Before the civil commission, Capt. Barbour Lewis, Judge Joseph Williams, A. C. Ketchum, esq.

Original petition.

The petition of Thompson Dean, a loyal citizen of the State of Ohio, showeth:

69 That on the 20th day of July, 1861, James H. Pepper, being the owner thereof, sold & assigned to Benjamin May one hundred & fifty-four shares of that capital stock of the Memphis Gas-Light Company, a company incorporated by an act of the general assembly of the State of Tennessee, entitled "An act to incorporate the Memphis Gas-Light Company," approved November 20th, 1851, the par value of each share in said company being one hundred dollars, for the sum of fifteen thousand four hundred dollars, being the value of the stock so assigned; the assignment being made on the books of said company, in said city, in the words following, to wit:

For value received I hereby transfer & assign to Ben May one hundred & fifty-four shares in the capital stock of the Memphis Gas-Light Company, which have been paid up in full.

In witness whereof I have hereunto set my hand the 20th day of July, 1861.

70 The same being part of the stock conveyed to and by T. Dean on the 23rd May, 1861.
May, 1861.

JAMES H. PEPPER.

And the petitioner says that in fact the stock was not paid for at the time, but was sold on a credit, as hereinafter set forth; that at the time of said assignment, said May, to secure to said Pepper the purchase-money for said stock, to wit, fifteen thousand four hundred dollars, with interest at the rate of six per cent. per annum, made & delivered to him his certain instrument in writing, or promissory note, for the sum of money with interest at said rate, and also a mortgage on said stock to secure the payment thereof, a copy of wh' note, marked "A," and of s'd mortgage, marked "B," are herewith filed & made a part of this petition, the said mortgage having been duly recorded in the office of the register of the county of Shelby, in s'd State,
71 on the 26th day of July, 1861, both of which instruments were made & delivered at said city of Memphis.

He further says that on the 21st day of June, 1861, the said Pepper sold & assigned, on the books of said company, thirty other shares of the stock of s'd company to said May by an assignment of the same tenor and effect, except as to date & the amount, as that hereinbefore set forth, and on the same terms, & at the like par value, to wit, for three thousand dollars; and to secure the payment of said sum, with interest at the rate of six per cent. per annum, the said May, on the 21st day of June, at said city, executed a like instrument in writing or promissory note on said sum, with interest at said rate, and delivered the same to said Pepper on the 20th day of July, 1861, and a mortgage to secure the same on said thirty shares of stock, or the interest repre-
72 sented thereby in the effects of said company, said note & mortgage, except as to amount & number of shares and date of said note, being of the same tenor & effect of those first above mentioned, a copy of which last-mentioned note and mortgage, marked "C," "D," respectively, are herewith filed and made a part of this petition, the said mortgage having been duly delivered at the date thereof & recorded in like manner in the mortgage first mentioned, on the said 26th day of July, 1861.

And the petitioner avers that by the terms, tenor, and effect of said notes & mortgages the said sums of money respectively were to be paid out of the net quarterly earnings of the amounts or shares aforesaid of the capital stock of said company; but if the said May failed to pay to said Pepper any instalment of the net quarterly earnings of said amounts
73 respectively of said capital stock, after the receipt of such net earnings by said company, the whole of the sums of money mentioned in said notes & mortgages, respectively, become due and payable with the interest at six per cent. per annum.

And the petitioner avers that, on the 18th day of December, 1861, there had accrued of the net earnings of said stock mentioned in said notes and mortgages (in sums proportionate to the amount of stock mentioned in such notes) the aggregate sum of fourteen hundred & seventy-two dollars, wh' sum had been received & was then in the hands of s'd company as the net earnings of said stock (being two quarterly dividends thereon).

And on the 17th day of M'ch, 1862, the sum of eighteen hundred & forty dollars accrued in like manner, being the net earnings of
74 said stock for one quarter, which sums of money were, at the

times aforesaid, respectively received by said May from said company as such net earnings.

And the petitioner avers that the said May did not pay the said sums of money, or either of them, or any part thereof, to said Pepper, to this petitioner, but wholly failed & neglected to do so, and the said sums of money in said notes & mortgages mentioned remain wholly due & unpaid, together with all the interest thereon accrued.

Wherefore petitioner says that the whole of said sums are now due & payable, with all the interest thereon accrued, according the terms & effects of said notes & the condition thereof.

The petitioner further says that, on the day of , 186 , the s'd James H. Pepper, by endorsement in writing, assigned the said notes to him, & delivered to him the said mortgages for value received, & that he is now the bona fide owner of the same. He further says that
75 the stock in said company is personal property, that the title of the real estate mentioned in said mortgage is in said company, & that said mortgages were intended to be, and are in effect, mortgages on said stock only.

He further says that, on the 20th day of March, 1862, & after said notes so became due as aforesaid, the said May, on the books of said company, assigned the whole of said stock, to wit, 184 shares, to T. A. Kendig, he by the terms of the assignment assuming the liability of the said May on said notes & mortgages, &, as petitioner is informed, claims some interest in said stock. But this petitioner says that said Kendig has not paid to said Pepper or to himself any part of either of said sums of money, or of the accrued interest thereon.

He makes the said Benjamin May & T. A. Kendig defendants to this petition.

76 He therefore prays for judgment against the said May for the amount due on said notes & mortgages, to wit, eighteen thousand & four hundred dollars & interest thereon accrued since the date of said notes, respectively, and for the foreclosure of said mortgages on the said one hundred & eighty-four shares of stock, and for the sale thereof to pay & satisfy the amount found due him on said notes, & cost accruing herein, & accruing interest, or that the court may adjudge that said stock shall be assigned to him at its par value in satisfaction so far of his debt, and for all other or further or different relief that justice may require.

And he will ever pray, &c.

THOMPSON DEAN,
Petitioner,
By W'M S. HOLMAN,
His Att'y.

77 STATE OF OHIO,
Hamilton County, City of Cincinnati, sct.:

Before me, the undersigned, a notary public in and for s'd county, this day personally came Thompson Dean, the foregoing petitioner, who, being by me duly sworn, deposeth & saith that he is a citizen of the State of Ohio, & a true & loyal citizen of the United States, & has not given aid or comfort to the rebellion or the public enemies.

He further says that the foregoing petition is true in substance and matter of fact, and further saith not.

T. DEAN.

Subscribed and sworn to before me on this 17th day of August, 1863, as witness my hand & seal of office.

ALEX. B. HUSTON,
Notary Public.

78 *Copy of note & mortgage.*

Copy of Note A.

$15,400.] MEMPHIS, TENNESSEE, *July 20th*, 1861.

For value received, I promise to pay to the order of James H. Pepper the sum of fifteen thousand & four hundred dollars, with interest at the rate of six per cent. per annum from date until paid out of the net receipts of earnings on the sum of fifteen thousand four hundred dollars of the capital stock of the Memphis Gas-Light Company, of the city of Memphis, Tennessee, said sum & interest being first paid, and the balance of said net receipts then to be applied upon the principal, which said instalment shall amount to such sums of money as shall be equal to the quarterly net receipts of earnings on fifteen
79 thousand & four hundred dollars of the capital stock of said company.

This note & obligation being given for the purchase-money of fifteen thousand & four hundred dollars of the capital stock of said company, sold & transferred to me by said Pepper.

& if I fail to pay any of said instalments quarterly as aforesaid, after the receipt by said company of said net earnings, then the full sum of fifteen thousand and four hundred dollars with interest, less interest & instalments paid, shall become due & payable.

On which is indorsed the following assignment, to wit:

For value received I assign the within note & obligation to Thompson Dean.

(Signed) JAMES H. PEPPER.

Copy of Mortgage B.

Know all men by these presents, that Ben. May of the city of
80 Memphis, in the State of Tenn., in consideration of fifteen thousand and four hundred dollars to him paid by James H. Pepper, the receipt whereof is hereby acknowledged, doth hereby grant, bargain, sell and convey unto the said James H. Pepper, his heirs & assigns forever, the following real estate & other property, viz:

So much of my individual interest, right, title, & estate in the property & premises of & belonging to the Memphis Gas-Light Company (hereinafter described) as shall be represented by and is equal to fifteen thousand & four hundred dollars of the capital stock of said company at par, said real estate, property, & premises being described as follows: The same being in Memphis, in the State of Tennessee, being all of these certain lots, tracts, or parcels of ground particularly described as follows, viz: Block No. four hundred and forty-eight & block number four hundred & fifty-five (448 & 445), as known on the plan of said
81 city of Memphis, & bounded by Chickasaw street on the west, by Mill st. on the south, such lots fronting one hundred & forty-eight feet and six inches on Chickasaw street & extending back one hundred & forty-eight feet six inches from the same.

Also, two other certain pieces or parcels of land known & designated

on the plan of said city of Memphis as lots numbers four hundred & forty-six (446) and four hundred & forty-seven (447), fronting two hundred & ninety-seven feet on Main st., and running back west to the said lots above mentioned, & numbered four hundred and forty-eight & four hundred & forty-five.

Also, my interest, right, title, & estate, to the extent aforesaid, in the gas-works, buildings, machinery, apparatus, pipes, material, appurtenances, metres, fixtures, personal & other property of whatever kind and description, situated & being in & upon the premises
82 above described, or situated elsewhere in the city of Memphis aforesaid, and in anywise belonging, appertaining to said company or connected with said gas-works, & all the right, title, interest, & estate, to the extent aforesaid, of the said Ben. May, either in law or equity, of, in, & to the said premises & property to the extent aforesaid, together with all the privileges & appurtenances to the same belonging or in anywise appertaining. To have & to hold the same to the only proper use of the said James H. Pepper, his heirs & assigns, forever.

And the said Ben. May, for himself, his heirs, executor, and administrators, & assigns, doth hereby covenant with the said James H. Pepper, his heirs & assigns, that he has good right to sell the same, that the title so conveyed is clear, free, & unincumbered by any act of said Ben. May, & that he will warrant & defend the same unto
83 the said James H. Pepper against all claims by, through, or under him, his heirs, or assigns.

Provided always, & this conveyance is made upon condition that if the said Ben. May shall pay or cause to be paid unto the said James H. Pepper, his legal representatives or assigns, his certain promissory note & obligation, according to the tenor & effect thereof, a copy of which is as follows, to wit:

$15,400.] MEMPHIS, TENNESSEE,
July 21st, 1861.

For value received, I promise to pay to the order of James H. Pepper the sum of fifteen thousand & four hundred dollars, with interest at the rate of six per cent. from date, until paid, out the net receipts of the earnings on the sum of fifteen thousand & four hundred dollars of the capital stock of the Memphis Gas Light Company, of the city of
84 Memphis, Tennessee, said sum & interest being payable in quarter annual instalments, the interest being first paid and the balance of said net receipts then to be applied upon the principal, which said instalments shall amount to such sums of money as shall be equal to the quarterly net receipts of the earnings on fifteen thousand and four hundred dollars of the capital stock of said company.

This note and obligation being given for the purchase money of fifteen thousand and four hundred dollars of the capital stock of said company sold and transferred to me by said Pepper.

And if shall fail to pay any of said instalments quarterly as aforesaid, after receipt by said company of said net earnings, then the full sum of fifteen thousand & four hundred dollars with interest, less interest & instalments paid, shall become due & payable.

BEN. MAY. [SEAL.]

85 Then these presents shall be void; otherwise to remain in full force & virtue.

In witness whereof I, the said Ben. May, have hereunto set my hand & seal this 20th day of July in the year eighteen hundred & sixty-one.

(Signed) BEN. MAY. [SEAL.]

Acknowledgement.

STATE OF TENNESSEE,
County of Shelby:

Personally appeared before me, John P. Trezevant, clerk of county court of said county, Ben. Wade, the bargainor to the foregoing hereunto attached mortgage, with whom I am personally acquainted, & who acknowledged that he executed the same for the purposes therein contained.

Witness my hand at office this 28th day of July, 1861.

(Signed) JOHN P. TREZEVANT,
Clerk, &c.

86 *Indorsement.*

This mortgage was filed in my office for registration on the 22nd day of July, 1861, at 10 o'clock a. m., & so noted in note-book No. 5, page 44.

(Signed) JA'S W. KING,
Register.

STATE OF TENNESSEE,
Shelby County:

The foregoing mortgage, together with the clerk's certificate thereon endorsed, was this day duly recorded in my office, in book No. 48, pages 477, 478, 479, July 27th, 1861.

(Signed) JA'S W. KING,
Register.

Assignment.—Indorsed.

For value received, I assign the within mortgage to Thompson Dean

(Signed) JAMES H. PEPPER.

Copy of Note C.

$3,000.] MEMPHIS, TENNESSEE,
June 11th, 1863.

87 For value received, I promise to pay to the order of James H. Pepper the sum of three thousand dollars, with interest at the rate of six per cent. per annum from date until paid, out of the net receipts of earnings on the sum of three thousand dollars of the capital stock of the Memphis Gas Light Company, of the city of Memphis, Tennessee, said sum & interest being payable in quarter annual instalments, the interest being first paid, & balance of said net receipts then to be applied upon the principal, which said instalments shall amount to such sum of money as shall be equal to the quarterly net receipts of earning on three thousand dollars of the capital stock of said company.

This note & obligation being given for the purchase-money of three thousand dollars of the capital stock of said company sold & transferred to me by said Pepper.

88 And if I fail to pay any of said instalments quarterly as aforesaid, after the receipt by said company of said net earnings, then the full sum of three thousand dollars with interest, less interest & instalments paid, shall become due & payable.

BEN. MAY. [SEAL.]

Endorsed as follows:

For value received, I assign the within note to Thompson Dean.
(Signed) JAMES H. PEPPER.

Copy of Mortgage D.

Know all men by these presents, that Ben. May, of the city of Memphis, in the State of Tennessee, in consideration of three thousand dollars to him paid by James H. Pepper, the receipt whereof is hereby acknowledged, doth grant, bargain, sell, and convey unto said James H. Pepper, his heirs & assigns forever, the following real estate & other property, viz:

89 So much of my undivided interest, right, title, and estate in the property and premises of and belonging to the Memphis Gas Light Company (hereinafter described) as shall be represented by and is equal to three thousand dollars of the capital stock of said company at par, said real estate, premises, and property being described as follows: the same being in the city of Memphis, in the State of Tennesse, being all those certain lots, tracts, or parcels of ground, particularly described as follows, viz:

Block number four hundred & forty-eight, & block number four hundred & forty-five (448 & 445), as known on the plan of said city of Memphis, & bounded by Chickasaw street on the west, & by Mill s't on the south, each lot fronting one hundred & forty-eight feet and six inches on Chickasaw street, and extending back one hundred and forty-eight & six inches from the same.

90 Also two other pieces or parcels of ground, known & designated on the plan of s'd city of Memphis as lots numbers four hundred & forty-six (446) and four hundred & forty-seven (447), fronting two hundred and ninety-seven feet on Main s't, & running back west to the said lots above mentioned, & numbered four hundred & fifty-eight and four hundred & fifty-five.

Also, my interest, right, title, and estate, to the extent aforesaid, in the gas-works, buildings, machinery, apparatus, pipes, materials, appurtenances, metres, fixtures, personal & other property of whatever kind or description, situate & being in & upon the premises above described, or situated elsewhere in said city of Memphis, and in anywise belonging or appertaining to said company, or connected with said gas-works, & all the right, title, interest, & estate, to the extent aforesaid, of the said

91 Ben May, either in law or equity, of, in, & to the said premises & property, to the extent aforesaid, together with all the privileges & appurtenances to the same belonging or in anywise appertaining. To have and to hold the same to the only proper use of the said James H. Pepper, his heirs or assigns forever. And the said Ben May, for himself, his heirs, executors, administrators, & assigns, doth hereby covenant with the said James H. Pepper, his heirs and assigns, that he has good, right, and lawful authority to sell the same; that the title so conveyed is clear, free, and unincumbered by any act of him, the s'd Ben May, and that he will warrant and defend the same unto the said James H. Pepper against all claims, by, through, or under him, his heirs or assigns.

Provided always, & this conveyance is made upon condition that if the s'd Ben. May shall pay or cause to be paid unto the said James

92 H. Pepper, his legal representatives, or assigns, the certain promissory note and obligation, according to the tenor & effect thereof, a copy of which is as follows, to wit:

$3,000.] MEMPHIS, TENNESSEE,
June 11th, 1861.

For value received, I promise to pay to the order of James H. Pepper the sum of three thousand dollars, with interest at the rate of six per cent. per annum from date, until paid, out of the net receipts of earnings, on the sum of three thousand dollars of the capital stock of the Gas Light Company of the city of Memphis, Tennessee, s'd sum & interest being payable in quarter-annual instalments, interest being first paid, the balance of said nett receipts then to be applied upon the principal, which s'd instalments shall amount to such sums of money as shall be equal to the quarterly nett receipts of earnings on three thousand dollars of the capital stock of said company.

93 This note and obligation being given for the purchase-money of three thousand dollars of the capital & stock of said company, sold and transfer'ed to me by said Pepper.

And if I fail to pay any of said instalments, quarterly as aforesaid, after the receipt of said company of the said nett earnings, then the sum of three thousand dollars with interest, less interest & instalments paid, shall become due & payable.

(Signed) BEN. MAY. [SEAL.]

Then these presents shall be void, otherwise to remain in full force & virtue.

In witness whereof I, the said Ben. May, have hereunto set my hand and seal this twentieth day of July, in the year eighteen hundred & sixty-one.

BEN. MAY. [SEAL.]

JOHN P. TREZEVANT, *Clerk.*

94 *Acknowledgment.*

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, John P. Trezevant, clerk of county court of said county, Ben. May, the bargainor to the foregoing & hereunto attached mortgage, with whom I am personally acquainted, & acknowledged that he executed the same for the purposes therein contained.

Witness my hand at office this 22nd day of July, 1861.

JOHN P. TREZEVANT,
Clerk, etc.

On which mortgage are endorsed the following, to wit:

This mortgage was filed in my office for registration on the 22nd day of July, 1861, at 10 o'clock a. m., & so noted in note book No. 5, page 44.

(Signed) JAMES W. KING,
Register.

STATE OF TENNESSEE,
Shelby County:

95 The foregoing mortgage, together with the clerk's certificate thereon endorsed, was this day duly recorded in my office in book No. 48, pages 475, 476, & 477, July 26th, 1861.

(Signed) JA'S W. KING, *Register.*

(Endorsed:)
For value received I assign the within mortgage to Thompson Dean.
(Signed) JAMES H. PEPPER.

And afterwards, to wit, on the 1st day of Sept., 1863, the following summons was issued herein:

Summons.

Civil commission, district of Memphis.

To the marshall of civil commission, greeting:

You are hereby commanded to summon Benjamin May & T. A. Kendig, if he be found within the district of Memphis, personally to be and appear before the civil commission of the district of Memphis, within three days, at the court-room, then & there to answer the petition of Thompson Dean.

96 Herein fail not, & have you then & there this writ.

Witness John C. Gruson, recorder, at court-room, 1st day of Sept., 1863.

JOHN C. GREERSON,
Recorder.

Bond for cost.

I acknowledge myself the above-named petitioner's security, and bind myself to defendant in the sum of two hundred & fifty ($250) dollars, for prosecuting this suit with effect, or payament of all costs & damages.
Witness my hand & seal this 1st day of Sept., 1863.

JNO. W. LEFTWICH. [SEAL.]

(Endorsed:)
Issued 1st day of September, 1863.

JOHN C. GREERSON,
Recorder.

Marshal's return.

Come to hand 1st day of Sept., 1863. Benjamin May not found in my district, Sept. 3rd, 1863.

B. SEARCY, *Marshal,*
By H. A. ROBERTSON,
Deputy Marshall.

Executed personally on T. A. Kendig, Sept. 3rd, 1863.

B. SEARCY, *Marshal,*
By H. A. ROBERTSON,
Dep. Marshal.

97 And afterwards, to wit, on the 9th day of Oct., 1863, the following publication & proof of same was filed herein:

Civil commission district of Memphis.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG.

Benjamin May, one of the defendants in this case, will take notice

that whereas it appears from the return of the marshall of this commission that the defendant Benjamin May is a non-resident of the district of Memphis, it is ordered that publication be made, once a week for four consecutive weeks, requiring said defendant to enter his appearance in this case on or before the 8th day of October, 1863, & plead, answer, or demur to the plaintiff's petition, or the same will be taken for confessed & set for hearing ex parte.

JOHN C. GREERSON,
Recorder.

W. S. HOLMAN,
Att'y for Pl'ff.

98 *Affidavit.*

Civil commission district of Memphis.

STATE OF TENNESSEE,
City of Memphis:

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG. } No. 504.

Personally appeared before me, John C. Greerson, recorder of said civil commission, William H. Fetch, j'r, of lawful age, who, being by me duly sworn, makes oath and says that the notice of the pendency of the above-entitled suit before the civil commission, a copy of which notice is hereunto above attached, was published once a week for four consecutive weeks, commencing on the 8th day of Sept., 1863, & ending on the 29th day of Sept., 1863, in the Memphis Bulletin, a newspaper of general circulation printed & published daily in the city of Memphis, county of Shelby, in the State of Tennessee.

He further says that he, the said affiant, has no interest whatever in the above-entitled cause.

W'M H. FETCH, J'R.

99 Subscribed & sworn to before me the 9th day of Oct., 1863.
JOHN C. GREERSON, *Recorder.*

And afterwards, to wit, on the 12th day of Oct., 1864, the answer of T. A. Kendig to the plaintiff' petition was filed herein.

Answer of T. A. Kendig.

In the civil commission of the department of Memphis, Tennessee.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG.

Now comes the defendant, T. A. Kendig, and for his answer to plaintiff's petition in this action filed says that it is true that on or about the 20th day of July, A. D. 1861, one James H. Pepper was the owner of certain shares in the Memphis Gas-Light Company; that the par value of such shares or stock was one hundred dollars per share; that the said James H. Pepper did, on this 20th day of July, 1861, sell & deliver

unto Benjamin May, one of the parties made to this action, one
100 hundred & fifty-four shares of the stock of said company, for the sum of fifteen thousand & four hundred dollars ($15,400), being the par value thereof, for which said sum the said Benjamin May did execute unto the said James H. Pepper his conditional promissory note, & secured the payment of the same by a mortgage on the interest he had in the said Gas-Light Company.

Also, that on the 21st day of July, 1861, the said James H. Pepper did sell & deliver unto the said Benjamin May thirty other shares in the stock of the s'd Gas-Light Company, for the further sum of three thousand dollars, for which the said May executed his conditional promissory note, secured by a mortgage of his interest in said company, as in the first transaction, all of which as it appears by & from the exhibits filed with the plaintiff's petition; that the condition, as set forth
101 in the said notes, are such that the said May was to make payment on the same in quarter annual instalments, in sums equal to the amount of nett earnings accruing quarterly on the am't of his said interest in the said company, viz, eighteen thousand & four hundred dollars.

But this defendant states that on the day of September, 1861, that there had accrued as s'd May's share in the net earnings of the said company the sum of dollars & , that at this date being the end of first quarter, upon which the first instalment was to be paid on the s'd notes.

This defendant further admits that on the 18th day of December, 1861, the end of the second quarter, at which a payment came due, there was in the hands of the company the sum of dollars as the am't of his, Ben May's, interest in the said net earnings of the said company, & that there were at other periods, representing the
102 time of the instalments coming due on the said notes, other sums of money in the hands of said company belonging to Benjamin May as his interest in the net earnings thereof, & of this defendant, T. A. Kendig, as the legal representative of the said May's interest therein.

But this defendant, T. A. Kendig, states as a reason why said net earnings were not paid in pursuance of the tenor & effect of the said notes, that prior to the 18th day of December, 1861, 16th day of December, 1861, the country being involved in civil war, this portion of the Federal Government was under the authority & control of the so-called "Confederate States of America"; that prior to the 18th day of December, 1861, the defendant, Benjamin May, was garnished by the authority of the so-called "Confederate States of America," & notified to appear at Jackson, State of Tennessee, before the federal court of the so-called "Confederate States of America," then and there to
103 answer touching this particular indebtedness, being also notified to withhold the payment of this said debt, or any part thereof.

That defendant May had no power to act in opposition to the authorities that then existed in this part of the State, & therefore was obliged to withhold the payment of the said notes as set forth therein until such time as the Federal Government might resume the control & authority in this portion of the United States.

That as soon as the Federal authority was again established in this portion of the county so that the defendant May was relieved from the force & virtue of the orders coming from the authorities of the so-called Confederate States of America, then your defendant forthwith proceeded to offer the full sum of all the money due on the said notes as the net

earnings of the said May's interest in the said company up to that date, being the day of , 1862.

That the said plaintiff did then & there, being in the city of
104 Memphis, Tennessee, utterly refuse to accept the same; so did the said Pepper. That this defendant done all in his power to perform & fulfill the stipulation of the said notes, but that the plaintiffs did hinder and prevent him from doing what the provisions therein required since the occupation of this place by the Federal authorities; that although the plaintiff has so refused to receive the said sum of money, yet this defendant is ready & willing to pay on the said sum of money to the plaintiff or any other person authorized to receive the same, & to do & perform all the stipulation set forth in the said notes in the payment of the quarter-annual instalments.

This defendants further admits that he did, on the 18th day of March, 1862, buy & purchase all the right, title, & interest of the said May in said gas-light company, making an assignment of the same for
105 value received on the books & otherwise.

This defendant further denies that the said mortgages cover only the personal property of the said company; but alleges that they do so, as within themselves stated, include and bind all the real estate of the said company.

Defendant further states that the title of the said real estate is in the said company exactly the same as the personal property thereof, and all of it is so set forth in the said mortgage, and that the foreclose of the said mortgages will necessarily involve the sale of real estate of which this court has no jurisdiction, & hence unable to give the relief asked by plaintiff.

And now having fully answered as to the matters & things set forth in the plaintiff's petitition, this defendant asks to be discharged with his costs.

T. A. KENDIG.

Subscribed & sworn to before me this 12th day of Oct., 1863.
JOHN C. GREERSON, *Recorder.*

106 (Endorsed:) Filed 12th Oct., 1863. John C. Greerson, recorder. Brown, att'y for def't.

And afterwards, to wit, on the 13th day of Oct., 1863, the following demur'er was filed herein by the plaintiff:

Demur'er.

State of Tennessee, civil commission, district of Memphis.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG.

Now comes the said petitioner Thompson Dean and demurs to the answer of the said T. A. Kendig filed herein, for the following grounds of objection, viz:

First. Because the said answer and the matters & things therein set forth are not sufficient in law or equity to bar or defeat the said petitioner's action.

Second. And the petitioner demurs to so much of said answer
107 as seeks to avoid the legal effect of the failure of said Benjamin May to perform the conditions of said notes and mortgages by

the obligation that the said May was garnisheed by the authority of the so-called Confederate States of America & notified to withhold the payment of said debts, & that said May had no power to act in opposition to the authorities that existed in this part of the State of Tennessee, & was therefore obliged to withhold the payment of said notes until such time as the Federal Government might resume its authority, and specified the following objections to that part of said answer, viz:

1st. That said insurrection against the Government of the United States did not excuse the said May from the fulfillment of his contracts or furnish any legal defense of his failure to fulfill the same.

Second. It is not averred in said answer that said May was
108 not aiding in said insurrection any giving aid and comfort to the so-called Con'edrate States of America, by the authority of which the said Kendig alleges that the said May was prevented from fulfilling the conditions of said notes.

3rd. That said Kendig being a stranger to the contracts, set up the defense to the action.

4th. That no legal tender to the petitioner, or to said James H. Pepper, of the sums due on said notes, at any time, either before or after the authority of the Federal Government was re-established as such.

And to so much of said answer as denies the jurisdiction of the court, because the said mortgages include & bind all the real estate of said Gas-Light Company, the said petitioner demurs, & points out the following objection thereto, viz:

1st. That the effects of said mortgages is a question of law &
109 not of fact, and, in contemplation of law, the said mortgages embrace & create a lien on the stock therein referred to only, and not on the real estate.

2nd. That the petitioner by his petitioner only asks judgment on said notes, and the foreclosure of said mortgage on the 184 shares of the capital stock of said company for the purchase money of which the said notes are given, and to secure which said mortgages were given, such stock being personal property.

And the petitioner does not by his petition claim any *line* on said real estate, but avers that the title thereof is in said company & not in the stockholders thereof, and that defendant does not deny the averment in the petition that the mortgages were intended by the parties thereto as mortgages on the stock only.

W. S. HOLMAN,
Att'y for Petitioner.

110 (Endorsed:) Filed 13th Oct., 1863. J. C. Greerson, recorder.

Oct 15th, 1863.—Demurrer sustained.

And afterwards, to wit, on the 19th day of Oct., 1863, the following amended answer to plaintiff's petition was filed herein:

Amended answer.

Civil commission, district Memphis, State of Tennessee.

THOMPSON DEAN
vs.
BEN MAY AND T. A. KENDIG.

The said defendant by way of amended answer to the petition.

He admits the sale & purchase of the number of shares of stock in the

Gas-Light Co., Memphis, Tenn., as stated in the petition; also the execution of the note & mortgage, the transfer to plaintiff by Pepper, and the sale & purchase of May's interest to this defendant.

Defendant says, by the terms of said contract, the same was to
111 be performed in the city of Memphis, Tennessee; that the quarterly earnings of said company was to have been paid over in the city, when declared by the company and the same demanded by plaintiff.

Defendant says & charges that at no time after the sale of the stock & the purchase by May was the plaintiff in the city of Memphis, Tennessee, to receive the quarterly dividend on said stock prior to the occupation of the city of Memphis by the federal forces, which was in June 6th, 1862. The amount of dividends received by the defendant and the said May to June, 1862, was $3,312.00.

Defendant states that soon after the Federal forces took possession of this city, which 6th June, 1862, the plaintiff arrived in the city of Memphis. When defendant learned he was here, he sought him out & tendered to him the full amount which was due & had been paid over as the quarterly earnings to that time, which tender he here pleads and
112 continues by bringing the said amount into court, which the plaintiff refused to receive.

Defendant says that about the time of the tender the said plaintiff took military possession of the said company & has been in receipt of the quarterly dividends on said No. of shares since that time, which would amount to some four or five thousand dollars, which amounts this defendant is entitled to a credit for on said note. To ascertain said amount he prays a reference to a commissioner with authority to take proof, &c., & report amount to this commission.

Defendant denies that this commission has the power to cancel said contract as asked for in the petition. Denies that all the interest he has in said company is personal property, or that it was intended by the parties that it should so be regarded, but that a part of it is real
113 estate, & so treated by the parties in taking the mortgage, therefore denies that the commission has the power or jurisdiction to grant the relief asked in the premises, as it would involve the sale of real estate. He relies upon this want of jurisdiction in this commission in defence, & asks that said cause may be dismissed.

Now having fully answered, &c.

T. A. KENDIG.

Subscribed & sworn to before this 19th day of Oct., 1863.

J. RADFORD,
Dep. Recorder.

(Endorsed:) Filed Oct. 9th, 1863. B. J. Radford, dep't rec'rd.

And afterwards, to wit, on the 19th day of Oct., 1863, the plaintiff filed his demurrer herein to the defendant's amended answer.

Demurrer.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG. } Petition.

114 Now comes the said plaintiff and demurs to the said amended answer of the said T. A. Kendig, filed herein, for the following grounds of objection:

1st. Because the said amended answer & the matters & things therein set forth constitute no defense to the plaintiff's action.

2nd. And the said plaintiff demurs to so much of said amended answer as set up by way of defense, that by the terms of said contract between the said Pepper & May the same was to be performed in the city of Memphis, Tennessee; that the quarterly earnings of s'd company was to have been paid over in the city where declared by the company, & when the same were demanded by plaintiff, & that no time after the sale of said stock was the plaintiff in the city of Memphis to receive quarterly dividends prior to the occupation of the city of Memphis
115 by the Federal force, & that so soon as said plaintiff arrived in the city of Memphis after the Federal forces took possession of the city and the defendant learned the fact he tendered him the full am't due, for the following grounds of objection:

1st. Because the construction of the contract is a question of law & not of fact, & the statement aforesaid of the effect of the contract is not in conformity with the contract as set forth.

2nd. It is not averred that said Pepper was not in the city of Memphis or that said plaintiff was absent from the city of Memphis when the dividends were divided.

3rd. By the terms of the contract between Pepper & May as set forth, it was not required to be performed in the city of Memphis, & no demand on the part of the plaintiff was necessary after said May received said quarterly dividends. It is not averred that said May was not con-
116 tributing to the insurrection by reason of which intercourse between the city of Memphis & other sections of the United States was interrupted.

3rd. And the plaintiff demurs to so much of said answer as set up that said mortgages were mortagges on real estate, therefore beyond the jurisdiction of the court.

1st. Because the construction of the mortgages is a question of law & not of fact (& because it is not denied that the parties understood & intended said mortgages to be mortgages on the stock only, & because in effect the mortgages are on the stock only & not the real estate, the title of which is in the corporation.)

W. S. HOLMAN,
Att'y for Pl'ff.

(Endorsed:) Filed 19th Oct., 1863. J. C. Grierson, recorder.

117 And afterwards, to wit, on the 19th day of Oct., 1863, the plaintiff filed his replication herein.

Replication.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG.

Now comes the said plaintiff and for reply to the amended answer of the said T. A. Kendig says:

1st. That it is not true as a matter of fact that by the terms of said contract the said quarterly earning of said stock were required to be paid over by the said May to the said Pepper at the city of Memphis, or that the said Pepper or the plaintiff as his assignee were required to demand the same.

It is true that the said plaintiff was not in the city of Memphis after

the assignment of said stock to said May until the said city was
118 occupied by the military forces of the United States for the reason that persons in armed insurrection against the Government of the United States occupied said city which prevented the plaintiff & other loyal citizens from visiting said city.

Yet plaintiff avers that during all of that time the said May was giving aid & encouragement to said insurrection & was confederating with disloyal persons in said city, which fact, as plaintiff avers, was well known by the said Kendig at the time he received from said May an assignment of said stock, & the said May a short time before the government took military possession of said city left said city with other disloyal persons and is now, as plaintiff is informed & believes, within the lines of persons so in arms against the United States.

And the plaintiff further says, that the said Kendig did not any time tender to him the s'd amount of $3,312; that certain persons pre-
119 tending to act for said Kendig spoke to the plaintiff of making such tender, but the same was not in fact made.

Plaintiff further avers, that one Shelby, who is now deceased, as the agent of said Pepper, did demand of the said May, while still in the city of Memphis, and after he had received a part of said net earnings, the payment thereof, but the May refused to pay the same

2nd. Plaintiff further says that he was placed in the military possession of the said gas-works to prevent dividends on portions of the stock of said company being paid to disloyal persons, but that on the 28th day of March, 1863 (or about that time), directors were duly elected for said company by the stockholders thereof, and on the day of March, 1863, a president & secretary of said company elected in conformity with the charter of the company; that at the time the Federal Gov-
120 ernment took possession of said city, the said company (three directors of which, to wit, Benjamin May, A. T. Nelson, & F. Titus, were disloyal and have gone into the so-called Confederate States in which armed insurrection now exists) had on hand about fifteen thousand dollars in a fraudulent & illegal currency called Confederate scrip & no other moneys, & the coal necessary for the company's works was nearly exhausted, & extensive outlays for repairs were necessary to be made, so that only one dividend has ever been made on said capital stock since the same was under the present loyal control, the same being a dividend of 10 per cent. on the par value of the stock, made on the 4th day of June, 1863, & plaintiff has received as such dividend on the said 184 shares of stock $1,840, which he is willing the court should apply on said indebtedness; and the condition of said company and of its expenditure
121 does not admit of further dividends at this time in the exercise of reasonable prudence; & the plaintiff further says that the present secretary and president of said company are fully informed of its condition as he believes, & that he ought not to be delayed in his suit by a reference of this court to a commission to take proof, as the net earnings of said stock can be readily ascertained by the court.

THOMPSON DEAN,
By W. S. HOLMAN, *Att'y.*

Affidavit.

District of Memphis—civil commission.

STATE OF TENNESSEE,
Shelby County:

William S. Holman, being sworn, says that he is the attorney at law

of the said plaintiff in the above action; that the plaintiff is not in the city of Memphis, but is, as affiant believes, in the city of Cincinnatti, Ohio, where he resides; that if this action is delayed to obtain the oath of said plaintiff to the foregoing reply, it must result in a mate-
122 rial delay, and to the material injury of the plaintiff's rights, as affiant believes; that said plaintiff was in the city of Memphis at the time the court sustained the demur'er to the answer of said Kendig, & affiant was led to believe from the letter from the attorney of said Kendig, hereto attached, that said Kendig would not set up new matter of defence, & therefore did not inform the said plaintiff of the necessity of his remaining in said city; that affiant, as such attorney, has inquired diligently into the facts set forth in the above reply, and from the information derived from said plaintiff, & from the secretary of said company & from all other sources of information within his reach, he verily believes, from the information so obtained, that the said reply is true in substance and matter of fact (except) that he does not make oath as to the construction of s'd contract, & further says not.

W. S. HOLMAN.

123 Subscribed & sworn to before me this the 19th day of Oct., 1863.

A. C. KETCHUM, *Com'r.*

(Endorsed:) Filed this 19th day of Oct., 1863. John Greerson, record., by A. C. Ketchum.

Letter referred to above.

Letter.

Gen'l VEUTCH:

In the case of Thompson Dean vs. May & Kendig, at the request of Judge Holman, I consent to refer to the commission on the demurrer to the answer of Kendig, I think sets up all the defense that I know of.

We agree to submit the papers to you. I cannot appear before you, because I will be absent, & the page will not, so you will have to read & examine unaided.

Oct. 15th, 1863.

Yours, &c.,

R. B. BROWN.

And afterwards, to wit, on the 19th day of Oct., 1863, the following motion was filed by the plaintiff:

Motion.

THOMPSON DEAN }
vs. }
BEN. MAY ET AL. }

124 Plaintiff moves to strike out so much of Kendig's answer as alleges a tender of money, because the said money is not paid into court, or to the recorder of the court.

W. S. HOLMAN,
Pltff's Att'y.

And afterwards, to wit, on the 20th day of Oct., 1863, the order relative to the rejoinder & demur'er was entered & made herein.

Order of court.

THOMPSON DEAN
vs.
BEN. MAY & T. A. KENDIG.

OCT. 20*th*, 1863.

Now come the parties, and the demur'er filed by the plaintiff to so much of s'd amended answer as raises the question of the jurisdiction of the court over the subject-matter of this suit is by the court sustained.

And plaintiff having filed his replication to said amended an-
125 swer to the said defendant, Kendig, is required to file his rejoinder thereto on or before Oct. 21, 1863.

Attest:

BARBOUR LEWIS,
J. WILLIAMS,
A. C. KETCHUM,
Commission.

JOHN C. GREERSON, *Recorder.*

(Endorsed:) Filed October 31st, 1863. John C. Greerson, recorder.

And afterwards, to wit, on the 21st day of Oct., 1863, the following rejoinder of defendant filed herein.

In the civil commission, department of Memphis.

THOMPSON DEAN, PL'FF,
vs.
BENJAMIN MAY & T. A. KENDIG, DEF'TS.

Rejoinder.

The defendant, T. A. Kendig, for his rejoinder to plaintiff' replication, says:

That as to Benjamin May's confederating with disloyal citizens & leaving the city of Memphis with certain other disloyal citizens as in man-
ner & form charged & alleged in plaintiff's said replication, he
126,127 has not sufficient and knowledge sufficient whereof to form a belief & demands strict proof of the same.

Defendant further says, as to the appointment of officers for the said company and the expenses & dividends arising from the said Gas-light Company after the military occupation and holding the same, he has no certain knowledge & shall demand & require a strict proof of *the of* all the same, & now fully denying all the matters & things as set forth in said replication & joining issue in the facts therein denied.

This defendant still asks that a commission may be appointed to investigate all the facts in relation to the dividends & proceeds of the said company during the time it has been held & controlled by & under military orders, & all of which as asked & prayed in the defendant's amended answer.

T. A. KENDIG,
By his Att'y, R. B. BROWN.

128 (Endorsed:) Filed 21st Oct., 1863. J. C. Greerson, recorder.

And afterwards, to wit, on the 21st day of Oct., 1863, the following agreement of the parties was filed herein:

Agreement of parties.

Civil commission.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG.

Application having been made by the defendant, Kendig, for the appointment of a commission to take proofs as to the net earnings of the 184 shares of stock mentioned in the plaintiff's petition since military possession of the s'd Gas-Light Company was granted by military order to said plaintiff, it is now agreed that the statement of the said earnings set forth in the said plaintiff's reply is correct & the appli-
129 cation aforesaid waived Oct. 21, 1863.

W. S. HOLMAN,
Att'y for Pl'ff.
R. B. BROWN,
Att'y for Kendig.

(Endorsed): Filed 21st Oct., 1863. J. C. Grierson, recorder.

Civil commission, district of Memphis.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG. No. 504. Petition.

Now, on this the 24th day of October, 1863, comes the plaintiff, & the original summons issued in this cause having been returned by the proper officer, on the 3rd day of September, 1863, "not found," as to the said Benjamin May, & the publication of notice of the pendency of this suit as to him having been ordered, the said plaintiff now proves to the satisfaction of the court, by competent testimony, that
130 notice of the pendency of this suit had been duly given to said Benjamin May as required, by the publication of a notice of the pendency thereof in "The Memphis Bulletin," a daily newspaper of general circulation, printed & published in the city of Memphis, in the State of Tennessee, once a week for 4 consecutive weeks prior to the 8th day of Oct., 1863; on or before which day the said Benjamin May was by said notice required & notified to appear to said suit and plead, answer, or demur to the said plaintiff's petition or the same would be taken as confessed & set for hearing ex parte; & it having been proved to the satisfaction of the court that at the time of the commencement of this suit the said May was & still is a non-resident of the State of Tennessee, and the proof of the publication of notice of the pendency of this suit being deemed sufficient, on motion of the plaintiff he
131 the said Benjamin May is now (as he previously had been, to wit, on the 12th day of Oct., 1863) three times audibly called but comes not, and herein wholly make' default; and the said other defendant, T. A. Kendig, now comes, and as to him and the said plaintiff issues having been joined, this *comes* on motion is set down for hearing on the issues joined as aforesaid.

And the default of the said Benj. May, and the evidence having been heard, the court find upon the issues aforesaid for the said plaintiff, also that the allegations set forth in said petition are true, & that by the default of the said Benj. May the whole of the sums of money on said notes and mortgages specified, with interest thereon, at the rate of six per cent. per annum, were due and payable at the time of the commencement of this suit; that the said T. A. Kendig received the assignment of said stock from said May with the full knowledge of all the facts set forth in said petition and of the disloyalty of said May.

The court further find that the said plaintiff, while controlling the effects of said company by virtue of a military order, had received
132 as the nett earnings of said stock the sum of one thousand eight hundred and forty dollars, and by the agreement of the parties in open court the court find that that sum should be deducted from the amount due on said notes and mortgages as the nett earnings of said stock.

The court further find that after deducting the said sum of one thousand eight hundred & forty dollars, there is now due to the said plaintiff from the said Benjamin May, the sum of nineteen thousand and seventy-eight dollars and thirty-three cents ($19,078.33), being the aggregate of the principal of said notes and interest thereon accrued after deducting said sum of one thousand eight hundred and forty dollars.

The court further find that said one hundred and eighty-four (184) shares of the capital stock of the Memphis Gas-Light Company, assigned by said James H. Pepper to said May (and for the purchase-money of said notes t'o mortgages were given) and assigned by said May to said T. A. Kendig subject to said mortgages, are bound for & ought to be applied to the payment of the said sum of money so
133 due to the said plaintiff from the said Benjamin May.

It is therefore considered by the court that the plaintiff do recover of the said Benjamin May the said sum of nineteen thousand and seventy-eight dollars and thirty-three cents, together with the further sum of one hundred and twenty-two dollars and fifty cents ($122.50), being the costs and charges by him in this action paid and expended for which the said Benjamin May is liable.

It is further considered by the court that the said plaintiff do recover of the said T. A. Kendig the sum of fifteen dollars and fifty cents ($15.50 c'ts), being the costs & charges made and occasioned by the said Kendig in this suit & paid by the said plaintiff, & for the recovery of which the said plaintiff is entitled to his execution against the said Kendig.

It is further adjudged & decreed by the court that unless the said defendants do pay to the plaintiffs the said sums of money so recovered by him against the said Benjamin May forthwith, that their &
134 each of their right in equity to redeem said stock be barred and forever foreclosed, and the said plaintiff shall have his execution or order of sale on this judgment and decree for the sale of said stock to satisfy the amount so found due to him from the said May as aforesaid, which execution or order of sale shall be directed to the marshal of this commission, who shall proceed to advertize and sell the said one hundred and eighty-four shares of the capital stock of the Memphis Gas-Light Company, which sale shall be made by said marshal at the door of the court-room of this commission in the city of Memphis, at public auction, to the highest bidder for cash in hand after giving due notice *at* the time, place, and terms of sale for at least ten days preceding the day of sale in conformity with the laws of the State of Ten-

nessee, regulating sales of personal property on execution, and the said marshal shall execute and deliver to the purchaser of said stock an assignment thereof, on the presentation of which to the proper secretary of said company he shall assign the said stock to such purchaser
135 on the proper books of said company, which shall invest in such purchaser all of the interest of said defendants in said stock. And paying out of the proceeds of such sale the costs hereinafter accruing, the said marshal shall pay the residue thereof, or so much as shall be necessary, to the said plaintiff in satisfaction and discharge of the sum of money so by him recovered as aforesaid against the said Benjamin May, with interest thereon accrued, & if any surplus shall remain after satisfying the judgment & decree aforesaid with interest and costs, the same shall be paid to the said T. A. Kendig, and the marshal shall make due return of his proceedings in the premises.

All of which is finally ordered and adjudged and decreed by the court.

BARBOUR LEWIS,
J. WILLIAMS,
A. C. KETCHUM,
Commission.

136 And afterwards, to wit, on the 16th day of November, 1863, the following execution or order of sale was issued herein :

Civil commission, district of Memphis.

To the marshal, greeting :

Whereas on the 24th day of October, A. D. 1863, in a cause then pending before the said civil commission, wherein Thompson Dean was plaintiff and Benjamin May & Thomas A. Kenedy were defendants, the following judgments and decree was pronounced by the said civil commission, which has been fully approved, as appears by the records of said civil commission, to wit :

Civil commission, dis't Memphis.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG. } No. 504. Petition.

Now on this the 24th day of October, 1863, comes the plaintiff, & the original summons issued in this cause having been returned
137 by the proper officer on the 3rd day of Sept., 1863, "not found," as to the said Benjamin May, & the publication of notice of the pendency of this suit as to him having been ordered, the said plaintiff now proves to the satisfaction of the court by competent testimony that notice of the pendency of this suit had been duly given to said Benjamin May as required, by the publication of a notice of the pendency thereof *as* the "Memphis Bulletin," a daily newspaper of general circulation, printed and published in the city of Memphis, in the State of Tennessee, once a week for four consecutive weeks prior to the 8th day of October, 1863, on or before which day the said Benjamin May was by said notice required and notified to appear to said suit and plead, answer, or demur to the said plaintiff' petition, or the same would be taken as confessed, set for hearing ex parte.

And it having been proved to the satisfaction of the court that
138 at the time of the commencement of this suit the said May was and still is a non-resident of the State of Tennessee, & the proof of the publication of the notice of the pendency of this suit having been deemed sufficient, on motion of the plaintiff, he, the said Benjamin May, is now (as he previously had been, to wit, on the 12th day of Oct., 1863) three times audibly called, but comes not, & herein wholly makes default, & the said other defendant, T. A. Kendig, & as to him & the said plaintiff, issues having been joined, this cause on motion is set down for hearing on the issues joined as aforesaid, and the default of the said Benjamin May, & the evidence having been heard, the court find upon the issues aforesaid for the said plaintiff, & also that the allegations set forth in said petition are true, & that by the default of the said Benjamin May the whole of the sums of money
139 in said notes & mortgages specified, with interest thereon at the rate of six per cent. per annum, was due & payable at the time of the commencement of this suit, & that the s'd Kendig received the assignment of said stock from the said May with the full knowledge of all facts set forth in said petition and of the disloyalty of said May.

The court further find that said plaintiff, while controlling the effects of said company by virtue of a military order, has received as the net earnings of said stock the sum of one thousand eight hundred & forty dollars ($1,840), & by the agreement of the parties, in open court, the court find that that sum should be deducted from the amount due on said notes & mortgages as the net earnings of s'd stock.

The court further find that after deducting the said sum of one thousand eight hundred & forty dollars there is now due to the said
140 plaintiff from the said Benjamin May the sum of nineteen thousand & seventy-eight dollars & thirty-three cents ($19,078.33), being the aggregate of the principal of said notes and the interest thereon accrued after deducting said sum of one thousand eight hundred & forty dollars.

The court further find that the said one hundred & eighty-four shares of the capital stock of the Memphis Gas-Light Company assigned by said James H. Pepper *a* said May (and for the purchase money of which s'd notes & mortgages were given) & assigned by said May to said T. A. Kendig, subject to said mortgages & bound for & ought to be applied to the payment of the said sums of money so due to the said plaintiff from the said Benjamin May.

It is therefore considered by the court that the plaintiff do recover of the said Benjamin May the said sum of nineteen thousand & seventy-eight dollars and thirty-three cents ($19,078 ^{33}), together with the
141 further sum of one hundred & twenty-two dollars & fifty cents ($122 ^{50}), being the costs and charges by him in this action paid & e'pended, for which the said May is liable.

It is further considered by the court that the said plaintiff do recover of the said T. A. Kendig the sum of fifteen dollars and fifty cents ($15 ^{50}), being the costs & charges made & occasioned by the said plaintiff, & for the recovery of which the said plaintiff is entitled to his execution against the said Kendig.

It is further adjudged and decreed by the court that unless the said defendant do pay to the said plaintiff the said sum of money so recovered by him against the said Benjamin May, forthwith, that their & each of their right in equity to redeem said stock be barred & forever foreclosed, and the said plaintiff shall have his execution or order of sale on this judgment & decree for the sale of s'd stock to satisfy the

142 amount so found due to him from the said May as aforesaid, which execution or order of sale shall be directed to the marshal of this commission, who shall proceed to advertise & sell the 184 shares of the capital stock of "the Memphis Gas-Light Company," which sale shall be made by the said marshal at the door of the court-room of this commission, in the city of Memphis, at public auction to the highest bidder for cash in hand, after giving notice of the time and place & terms of said sale for at least ten days preceeding the day of sale, in conformity with the laws of the State of Tennessee regulating sales of personal property on execution; & the said marshal shall execute & deliver to the purchaser of the said stock & assignment thereof, on the presentation of which to the proper secretary of said company he shall assign said stock to such purchaser on the proper books of said
143 company, which shall invest in such purchaser all of the interest of said defendants in said stock, & after paying out of the proceeds of such sale the costs hereinafter accruing, the said marshal shall pay the residue thereof or so much as shall be necessary to the said plaintiff in satisfaction and discharge of the sum of money so by him recovered as aforesaid against the said Benjamin May, with interest thereon accrued, & if any surplus shall remain after satisfying the judgment & decree aforesaid with interest & costs, the same shall be paid to the said T. A. Kendig, & the marshal shall make due return of his proceedings in the premises.

All of which is fully ordered, adjudged, & decreed by the court.

(Signed) BARBOUR LEWIS,
J. WILLIAMS,
Commission.

Attest: (Signed) JOHN C. GRIERSON,
Recorder.

144 The decree of the commission in this case was duly approved by Brig. Gen'l James C. Veatch on the 14th day of November, 1863.

(Signed) JOHN C. GRIERSON,
Recorder.

And whereas the said defendants have wholly failed & neglected to pay to the said plaintiff the said sums of money in said judgment & decree specified, or any part thereof:

Therefore, you are commanded that, by sale of one hundred & eighty-four shares of the capital stock of the Memphis Gas Light Company, which you are commanded to advertize & sell in conformity with the judgment & decree aforesaid, you cause to be made the said sum of nineteen thousand & seventy-eight dollars and thirty-three cents ($19,078.33) of debt, & also the sum of one hundred & twenty-two dollars & fifty cents ($122.50), being the costs & charges by said plaintiff paid in said action, & the sum of fifteen dollars & fifty cents ($15.50),
145 being the costs & charges made & occasioned by T. A. Kendig in the suit, being the sum of money so by him recovered against the said defendant' Benjamin May and T. A. Kendig, as appears by the record aforesaid, & also the costs & charges which may accrue herein in the execution of the said judgment & decree, & in all things in the advertisement & sale of said stock, & the assignment thereof, & the application of the proceeds thereof, be governed by the judgment & decree aforesaid, & carry the same into full effect.

Herein fail not, & of this suit make due return.

Witness John C. Grierson, recorder of the civil commission, in the city of Memphis, this 16th day of November, 1863.

JOHN C. GRIERSON,
Recorder.

(Endorsed:) Issued November 16th, 1863.

JOHN C. GRIERSON,
Recorder.

146 And afterwards, to wit, on the 19th day of November, 1863, the following advertisement of sale was made herein:

Advertisement.

STATE OF TENNESSEE,
City of Memphis:

Marshal's sale.

By virtue of an execution or order of sale to me directed from the honorable civil commission for the district of Memphis, I will sell at public auction to the highest bidder, for cash in hand, at the door of the court-room of the civil commission, No. 281 Main st., in the city of Memphis, on the 28th day of November, A. D. 1863, between the hours of 10 a. m. & 4 p. m. on s'd day, the following described property, viz:

One hundred & eighty-four shares of the capital stock of the Memphis Gas Light Company, in the city of Memphis, in said State, which said shares of the capital stock of said company I will sell at the
147 time and place aforesaid, in obedience to the judgment & decree of said civil commission, rendered on the 24th day of Oct., 1863, in a cause wherein Thompson Dean was plaintiff & Benjamin May & T. A. Kendig were defendants, and the execution or order of sale to me directed founded on said judgment and decree.

Taken as the property of said defendants to satisfy said execution or order of sale.

B. SEARCY,
Marshall.

MEMPHIS, TENN., *Nov. 17th*, 1863.

And afterwards, to wit, on the 28th day of Nov., 1863, the following marshal's return was filed herein:

Marshall's return.

Civil commission, district of Memphis.

THOMPSON DEAN
vs.
BENJAMIN MAY & T. A. KENDIG.

148 By virtue of an execution, or order of sale, issued out of the civil commission for the district of Memphis, in the State of Tennessee, on the judgment or decree rendered in the above-entitled cause, attested by John C. Grierson, esq., recorder of said civil commission, and directed to me the undersigned marshall of said commission, bearing date the 10th day of Nov., 1863, commanding me to sell 184 shares of

the capital stock of the "Memphis Gas-Light Company," I did, as such marshall, proceed to advertise and sell the said shares of the stock of the "Memphis Gas-Light Company," and after giving *demand* legal notice of the time, place, and terms of s'd sale in full conformity with the requirements of the execution or order of sale aforesaid & on the 28th day of November, 1863, between the hours of 11 a. m. & 4 p. m. of said day, at the door of the court-room of said civil commission, in the city of Memphis, in the State of Tennessee (being the time & place men-
149 tioned in said notices for the said sale), I offered the said 184 shares of stock for sale at public auction, & Francis Barclay, having then & there offered and bid the sum of sixty-seven dollars & fifty cents per share for said stock, being in the aggregate the sum of twelve thousand four hundred & twenty dollars ($12,420.00) for said 184 shares of stock, & that being the highest bid offered thereon, I did then and there openly strike off & sell the said 184 shares of stock to the said Francis Barclay, who hereupon paid me the sum of twelve thousand four hundred & twenty dollars ($12,420.00) in lawful currency of the United States in full payment of said stock.

I do therefore in consideration of the premises aforesaid, and in obedience to the terms of the execution aforesaid, & in pursuance of the terms of said sale, assign to the said Francis Barclay the s'd 184 shares of the capital stock of the "Memphis Gas Light Company," so by
150 him purchased as aforesaid.

In witness whereof I have this day set my hand & seal.

Nov. 28th, 1863.

[SEAL.]

BEVELY SEARCY,
Marshall Civil Commission District of Memphis.

151 EXHIBIT G.

Civil commission, dist. of Memphis.

To the secretary of the Memphis Gas-Light Company, greeting:

You are hereby commanded to transfer on the proper books of the Memphis Gas-Light Company one hundred and eighty-four (184) shares of the capital stock of said company, heretofore owned and held by Benjamin May, and by him transferred to T. A. Kendig, to Francis Barclay, as the said shares were this day sold at public auction by the marshal of this commission, pursuant to an execution or order of sale to him directed, and the said Barclay having then and there offered and bid the sum of sixty-seven dollars and fifty cents ($67.50) per share, and that being the highest bid offered, the said shares were openly struck off and sold to the said Barclay, and you will accordingly
152 make the above transfer.

All this in pursuance of decree approved by Gen. Veatch in case No. 504.

By order of the commission.

Nov. 28, 1863.

BARBOUR LEWIS,
Pres't.

Attest:

JOHN C. GREIRSON,
Recorder.

(Endorsed:) Thompson Dean vs. Benjamin May & T. A. Kendig. Order for the transfer of stock.

For value received, I do hereby transfer and assign to Francis Barclay one hundred and eighty-four shares in the capital stock of the Memphis Gas-Light Company, which has been paid up in full.

In witness whereof, I have hereunto set my hand the 28 day of November, 1863.

W'M H. FITCH, J'R,
Sec'y.

The above stock was held by T. A. Kendig, sold on execution in favor of Thompson Dean vs. Benj. May and T. A. Kendig, and transferred in accordance with an order of the hon. civil commission of the district of Memphis, dated Nov. 28, 1863.

153 *Replication to answer.—Filed June* 21, 1875.

U. S. c't c't, west dist. T.

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } No. 11. Eq. D.

The plaintiff in this cause hereby joins issue with the defendant.

KERTRECHT & CRAFT,
For Pl'ff.

Order to file amended & supplemental bill.

T. A. KENDIG
vs.
THOMPSON DEAN.

In this cause, on motion of complainant, on notice given to defendant, and cause shown, leave is granted him to file an amended and supplemental bill at any time before or at the next rule day.

CONNALLY F. TRIGG,
U. S. District Judge.

154 *Agreement of counsel.*

U. S. district court at Memphis.

THOMPSON DEAN
vs.
T. A. KENDIG ET AL. } In chancery.

We, the undersigned, counsel in this case, agree that all the depositions taken in the case of Thompson Dean vs. T. A. Nelson et al., and which are applicable to the above-stated case, shall be read as evidence in this case without retaking, provided that either party may have the right to retake any of them if they see proper on giving legal notice.

JA'S R. CHALMERS,
Sol. for Kendig.
McRAE & WALKER,
For Dean.

Deposition of Charles S. Cook.

Circuit court of United States for district of West Tenn., at Memphis.

T. A. NELSON & WIFE AND BEN. MAY
vs.
THOMPSON DEAN. } In equity.

155 Interrogatories to be propounded to E. M. Yuger and Cha's S. Cook by compl'ts on their examination, as witnesses for complainant in the above cause.

Int. 1st by compl't. Are you acquainted with Thompson Dean, the defendant in this suit?

Int. 2nd by same. State whether or not you, or either of you, at any time, made a tender, or were present when a tender was made, of money to defendant Dean for one T. A. Kendig, as dividends on stock in the Memphis Gas-light Company, which had been paid to Ben. May. If yea, state all that you know about it, giving time and place, and the kind and amount of money tendered, and all that took place. State how you came to be connected with the matter, and all the defendant Dean said. State how the tender was made, and by whom, and for what the tender was made, and all other particulars.

Answer of Cha's S. Cook.

Int'y 1st. I am acquainted with Thompson Dean.

156 Inter. 2nd. I made a tender to Thompson Dean for T. A. Kendig in payment for dividends of Memphis gas stock. I made the tender on or about the 23d July, 1862, in the Memphis gas office on 2nd street, in Memphis, Tenn. I made the tender in gold & U. S. currency, about twenty-five hundred dollars in gold and about one thousand in U. S. currency. Dean refused to receive it, and told me if I would pay the whole amount of this debt for the purchase of the stock he would take it, but that he would not take any instalments unless I would pay all. Kendig asked me to make the tender, as he was going away and would not be here to attend to it himself. I told Dean that the tender was made to pay the amount due as dividends on the stock purchased by Kendig of Ben. May.

CHARLES S. COOK.

Subscribed and sworn to before me this 9th day of August, 1867.
ISAAC MORRISON,
U. S. Com'r.

Cross-examination waived.

BULLOCK & ANDERSON,
Att'y for Def'ts.

156½ *Agreed facts.*

In the circuit court of the United States for the district of West Tennessee.

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } No. 11. Equity.

For the purpose of saving the expense of taking proof in the foregoing cause, the following facts are admitted by the parties:

1. The instruments in writing, filed as Exhibits A, B, C, & D, to the

answer of T. Dean were executed by Ben. May and delivered to James H. Pepper, and by him assigned to defendant Dean as per endorsements thereon, and that said Exhibits C & D were acknowledged & recorded as per certificates endorsed thereon.

2. That said May received the dividends on said stock as alleged in the answer of the said defendant, & that no payments were made by said May on the said notes, Exhibits A & B.

3. That Exhibit E to said answer contains a true copy of the special order No. 247, issued by Brig. Gen. J. C. Veach, then in com-
157 mand of the district of Memphis, a military district created by the proper military authorities of the United States & of the rules and regulations adopted by the civil commission created by said order, and that the State of Tennessee then was, and for two years or more after the date of said order continued to be, under martial law, and that the ordinary courts of justice, State & Federal, were, during said period, suspended and closed; that Beverly Searcy was appointed marshal of the said commission, and that said civil commission was organized and the members thereof qualified at the time and in the manner set forth in said answer, & that, during the period set forth in said answer the said commission did exercise, at the city of Memphis, within said district of Memphis, the powers conferred by said order, as in said answer, as alleged, and that Exhibit F to said answer is a full and complete transcript and exemplification from the records of said civil commission of the proceedings of which the same purports to be a record, and
158 of the issuing of the said order, and of the sale of said stock by said marshal, and of the return made by him, and the said transcript of said record shall be *decreed* a true record of the proceedings therein recited as the same were had.

4. That Barbour Lewis, capt. 1st Missouri Cavalry, was the president of the said civil commission, & that on the sale by said marshal and the return thereof, he issued the said order set forth in said answer as Exhibit G, and that in obedience thereto the secretary of said company transferred said stock on the books of said company to Francis Barkley, and issued to him a certificate dated 28 November, 1863, of which a copy is attached to said Exhibit G, and that said Francis Barclay afterwards assigned the same on the books of said company to said defendant Dean.

5. That neither Pepper nor Dean was in Memphis, or within the confederate lines, nor did either of them have any agent at Memphis, or within the confederate lines, authorized to receive the dividend at
159 the time when those dividends were received by May, nor until Dean came to Memphis after the Federal occupation thereof as stated in his answer.

6. That since the said stock was transferred to Dean under the civil commission proceedings, he has received from the gas company, and appropriated to his own use & still retains as dividends upon said stock, amounts of money more than sufficient to pay off the principal and interest of May's notes, Exhibits A & B.

Memphis, Tenn., Sept. 16th, 1874.

KERTRECHT & CRAFT,
Sol's for P. A. Kendig.
H. F. ELLET,
Sol. for T. Dean.

160 *Order for leave to file replication.*

May term, 1875.

MONDAY, *June 21st*, 1875.

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } Equity.

On the application of the complainant in the above-entitled cause, and by consent of defendant, leave is granted complainant to file his general replication to the defendant's answer herein now, to have the same effect as if such replication had been filed immediately after the filing of said answer, which is accordingly done.

161 And at, to wit, at the May term, 1875, of said circuit court, and on the 22d day of June, 1875, the following final decree appears of record in said cause, to wit:

THEODORE A. KENDIG
vs.
THOMPSON DEAN. } Equity.

This cause coming on for final hearing on bill, answer, replication, exhibits, and proofs, and having been argued by counsel and maturely considered; and it appearing that the complainant is not entitled to any relief touching the matters in issue in this case; it is therefore ordered, adjudged, and decreed, that the bill of complaint be and the same is hereby dismissed, and that the defendant recover of the complainant and of W. H. Kenedy, surety on the cost-bond, the costs of this cause, to be taxed.

162 And from the foregoing decree the complainant prayed an appeal to the next term of the Supreme Court of the United States, to be held at Washington City; which appeal is hereby granted.

And it is ordered that the said complainant shall, on or before the second Monday in October, 1875, which will be a day of the present term of this court according to the adjournment now resolved upon, execute and file his bond with good security, which the clerk of this court is hereby authorized to approve, and take in the penalty of five hundred dollars conditioned to prosecute his said appeal with effect, or to pay all costs which may be adjudged against him on said appeal.

Order approving bond.—Entered June 24, 1875.

T. A. KENDIG
vs.
THOMPSON DEAN. } Equity.

163 In this cause the bond of complainant in a penalty of five hundred dollars conditioned to prosecute his appeal with effect, or pay the costs adjudged against him therein, with A. D. Gwynn as surety, is this day approved and ordered to be filed by the court.

Appeal bond.

Know all men by these presents, that we, Theodore A. Kendig as principal, and A. D. Gwyn as his surety, are held and firmly bound unto Thompson Dean in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, &c., jointly and severally, firmly by these presents.

Witness our hands and seals this 23rd day of June, 1875.

164 The condition of this obligation is such, that whereas in a certain suit brought by the above bound T. A. Kendig against the said Thompson Dean on the equity side of the circuit court of the United States for the district of West Tennessee, a decree has been rendered by said court during its present May term, 1875, dismissing the bill filed by said Kendig, and from the said decree an appeal has been prayed by said Kendig, and granted by said circuit court to the next term of the Supreme Court of the United States to be held in Washington City:

Now, therefore, if the said T. A. Kendig shall prosecute his said appeal with effect, or, failing therein, shall pay or cause to be paid all costs which shall be adjudged against him on said appeal by the said Supreme Court of the United States, and shall in all respects abide by and

165 *and* perform the decree of the said Supreme Court as to the costs, then this obligation to be void, otherwise to remain in full force and effect.

T. A. KENDIG, [SEAL.]
By HENRY CRAFT, *His Atto. at Law.*
ANDREW D. GWYNNE. [SEAL.]

Subscribed to before me this 23rd day of June, A. D. 1875.
L. H. PILLSBURY,
U. S. Com'r D. W. T.

Personally came before me Andrew D. Gwynne, the surety named upon the above obligation, who, being by me first duly sworn, deposes and says he is worth the sum of one thousand dollars unencumbered real estate in his own right and name subject to execution in the district of West Tennessee.

ANDREW D. GWYNNE.

166 This bond approved by me this 23rd day of June, 1875.
H. E. ANDREWS, *Clerk.*

Approved:
CONNALLY F. TRIGG,
District Judge.

(Endorsed:) T. A. Kendig vs. Thompson Dean. Appeal bond for costs. Filed June 23rd, 1875. H. E. Andrews, clerk. L. H. Pillsbury, D. C.

Fee for transcript $35, paid by complainant.

167 THE UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee:

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the records and proceedings in said court, as the same now appear of record and

upon the files in my office, in the following cause, to wit: Theodore A. Kendig vs. Thompson Dean. № 11.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 2nd day of August, A. D. 1875, and of the Independence of the United States the 100th year.

[SEAL.]

HORACE E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

(Indorsed:) No. 11. Circuit court of the United States, district of West Tennessee. Theodore A. Kendig vs. Thompson Dean. Transcript.

(Indorsement on cover:) No. 319. Theodore A. Kendig, appellant, vs. Thompson Dean. West Tennessee, C. C. U. S. Filed 27th November, 1875.

Supreme Court of the United States.

Theodore
THOMAS A. KENDIG

vs.

Thompson
THOMAS DEAN.

No. ~~615.~~ 60

Brief of P. PHILLIPS, for Appellant.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

THOMAS A. KENDIG
vs.
THOMAS DEAN.
No. 319.

Brief of P. PHILLIPS, for Appellant.

In July, 1861, James H. Pepper sold and conveyed to Ben. May 184 shares of the stock of the incorporated "Memphis Gas Light Company."

He executed therefor his two obligations, one for $3,000 and the other for $15,400.

These obligations are identical except as to the amounts, and this is the description of one of them:

MEMPHIS, 11 *June*, 1861.

For value received I promise to pay to the order of James H. Pepper $——— with interest at 6 per cent. per annum from date until paid out of the net proceeds of earnings on the sum of $——— of the capital stock of the Memphis Gas Light Company of the city of Memphis, said sum and interest being payable in quarter annual instalments, the interest being first paid, and the balance of said net receipts then to be applied upon the principal; which said instalments shall amount to such sums of money as shall be equal to the quarterly net receipts of earnings on the $———of the capital stock of said Company.

The note and obligations being given for the purchase money of $———of the capital stock of said Company sold and transferred to me by said Pepper. And if I fail

to pay any of said instalments quarterly as aforesaid, after the receipt by said Company of said net earnings, then the full sum of $———, with interest, less interest and instalments paid, shall become due and payable.

BEN. MAY. [SEAL.]

At the same time May executed to Pepper his two mortgages.

They convey so much of May's "undivided interest, title, &c., in the property and premises of the Gas Company hereinafter described as shall be represented by, and is equal to, $—— of the capital stock of said company at par." (Here follows a particular description of certain real estate in Memphis):

"Also, his interest, title and estate to the *extent aforesaid*, in the gas-works, buildings, machinery, pipes, fixtures, personal and other property, &c., and all his right, title and estate to the extent aforesaid, either in law or equity, to the privileges and appurtenances to the same belonging."

The note is recited, and the condition of the conveyance is declared to be that if it is paid according to its tenor and effect, then the conveyance is to be void, otherwise to remain in full force and virtue.

These mortgages were duly recorded in the office of the register of deeds.

These notes and mortgages were duly assigned by Pepper to his principal, Dean, the appellee in this case. The date of this assignment is not stated.

March, 1862, Kendig purchased these 184 shares from May, and received from the company the following certificate, No. 502:

MEMPHIS, *March 22d*, 1862.

This is to certify that T. A. Kendig is the owner of one hundred and eighty-four shares of stock in the

Memphis Gaslight Company, which have been paid in full, transferable only on the books of this company.

JAS. M. WILLIAMSON,
W. H. FITCH, *Sec'y.* *President.* p. 2.

On the 8th December, 1865, Kendig filed his bill in the Circuit Court U. S. against Dean, alleging his ownership of said stock, as shown by this certificate, and the entry of his name on the books of the company as owner, and averring that subsequently, to wit, in July, 1862, Dean obtained possession of the books of the company and wrongfully and fraudulently procured a transfer to be made thereon to his own name as owner of the said 184 shares of stock, and the issuance to him of a certificate therefor.

The prayer of the bill is, that the said stock be restored to the complainant, and that the said Dean be divested of title thereto, that a transfer of the stock may be made on the books of the company to complainant, and for such other and further relief as may be consistent with the principles of equity. p. 2.

The answer of Dean filed 30th April, 1868, sets up the sale to May, and the execution of the notes and mortgages heretofore described.

It avers that May had received as net earnings on the 18th December, 1861, $1,472 (two quarterly dividends), and on the 17th March, 1862, $1,840, and that he had wholly neglected to pay the same according to the condition of his notes.

It further avers that the contract with May was unconscionable as there was no mutuality in the same.

Further, that Kendig has never paid or tendered any sum of money whatever on account of said stock.

That after the occupation of Memphis on the 9th De-

cember, 1862, by the forces of the United States he (the respondent) was placed in possession of the affairs of said company by military authority, but that afterwards to wit, on the 28th February, 1863, the new directors elected Williamson as President and Fitch as Secretary of said company.

The answer then sets up proceedings had by respondent before the "Civil Commission," a tribunal organized by Brig. Gen. Veatch under

SPECIAL ORDER No. 247.

MEMPHIS, *April* 25, 1863.

A "Civil Commission" is hereby organized for the district of Memphis, Tennessee, to hear and determine all complaints and suits instituted by *loyal citizens* of the United States for the collection of debts, the enforcement of contracts, the prevention of fraud, the recovery of the possession of property—real or personal—and generally to perform such duties and exercise such powers as can be done by a court deriving its powers from military authority.

All judgments, decrees, and orders must be reported to the General commanding the district for approval.

There was detailed for this Commission—CaptainLewis, Judge Williams, and A. C. Ketchum, Esq.

On the 1st September, 1863, Dean, in his petition before this Commission, set forth the sale of the stock to May, his execution of the notes and mortgages, his failure to pay over the dividends, and his assignment of the 184 shares on the books of the Company to Kendig, who, "by the terms of the assignment, assumed the liability of said May on said notes and mortgages."

The petition avers that the said mortgages were intended to be and are in effect mortgages on *said stock only*, and that the stock is personal property.

May and Kendig were made defendants, and judgment is prayed for as against May for the full amount of the

notes, and for a foreclosure and sale under said mortgage of the said 184 shares of stock. p. 23.

May was proceeded against as an absent defendant, and a decree *pro confesso* entered against him.

Kendig, in his answer—p. 30—after stating that the Company had in its hands money of May's when the instalments were due by him, avers also that the failure of May to pay over the dividends was owing to the fact that prior to December, 1861, May was garnisheed by the authority of the Confederate States, and notified to appear at Jackson before their district court to answer as to this indebtedness, and was then notified to withhold the payment of this indebtedness.

But that as soon as the Federal authority was reestablished, so that May was relieved, he, Kendig, forthwith tendered to Dean the full sum of all that was due on the notes as net earnings..

That Dean, being then in Memphis, utterly refused to accept the same, and that the defendant has done everything in his power to fulfill the stipulations of said notes.

That, notwithstanding this refusal, the defendant is now ready and willing to pay on said notes the quarterly instalments.

The answer concludes with a denial of the statement made in the petition, that the mortgages cover only the *personal* property of the company, but alleges that they include and bind all the *real estate* of the company. That the title to the real estate is in the company exactly the same as the personal property, and that the foreclosure of the mortgagee will necessarily involve the sale of the real estate, of which the commission has no jurisdiction, and hence unable to grant the relief prayed for.

In his amended answer, filed 19 October, 1863, Kendig avers that "soon after the Federal forces took possession of this city, 6th June, 1862, the plaintiff, Dean, arrived in

the city, and that he then sought him out and tendered to him the full amount that had been paid over as the quarterly earnings," which tender he again pleads and continues, by bringing the said amount into court.

Further, that about the time of the tender Dean took military possession of the company, and has been in the receipt of the quarterly dividends on said shares since that time, which would amount to some four or five thousand dollars, and to ascertain this a reference to a commissioner is asked for.

The answer also denies that the commission has power to cancel the contract, and concludes by a general objection to the jurisdiction of the commission, and asks that the cause may be dismissed.

The objection to the jurisdiction was overruled by the commission, p. 38.

On the 24th October, 1863, p. 39, the commission gave judgment against May for the sum of $19,078.33, and against Kendig for $15.40 costs.

It was further adjudged that unless the defendants pay to plaintiff the amount found due by May forthwith, their right in equity to redeem said stock shall be forever barred and foreclosed, and the plaintiff shall have his execution or order of sale of said stock, and on such sale the Marshal shall deliver to the purchaser an assignment of the stock, on the presentation of which the secretary of the company shall transfer the stock on the books of the company. p. 40.

A sale took place under this decree and the stock was purchased in the name of one Barkley, who immediately transferred the same to Dean.

On the bill filed by Kendig the case was tried on the transcript of the "Civil Commission" on an agreed

statement of counsel (p. 48) and the deposition of Charles Cook, p. 47.

Cook testified that on or about the 23d July, 1862, he tendered to Dean $2,500 in gold and $1,000 in U. S. currency; but Dean refused to accept any payment less than the full amount of the notes.

In the agreed statement it is admitted "that neither Pepper nor Dean was in Memphis or within the corporate lines or had any agent there authorized to receive the dividends at the time they were paid to May, nor until Dean came to Memphis after the Federal occupation."

It is further agreed "that since the stock was transferred to Dean by virtue of the judgment of the 'Civil Commission' he has received from the 'gas company' and appropriated to his own use as dividends on said stock amounts of money more than sufficient to pay off the principal and interest on said notes."

Upon the hearing of the cause there was a decree dismissing the complainant's bill, which is now brought here for review by an appeal.

Argument.

It is fully established that there has been entire good faith on the part of May and Kendig under the contract.

While the rule of the Confederacy prevailed, May, for a short period, was restrained from paying over the dividends.

As soon as the Federal authority was restored, Kendig at once, through his agent, Cook, made a legal tender of payment to Dean.

The first dividend, as we have seen, was received by May on 18th December, 1861; the second, 17th March, 1862; and Cook made his tender 23d July, 1862.

Neither Dean nor Pepper was in Memphis or within the Confederate lines, nor did either of them have any agent at Memphis, or within the Confederate lines, authorized to receive the dividends at the period when these dividends were paid to May, nor until Dean came to Memphis after the Federal occupation thereof, to wit, on 6th June, 1862.

These dividends, therefore, could not have been sooner paid over but by a correspondence with Pepper or Dean, who were outside of the Confederate lines, in violation of the proclamation of August, 1861, prohibiting intercourse between parties occupying different sides of the belligerent lines.

Where the *law* thus steps in and forbids or prevents the performance of a condition, the party promissor is not held for the default. This has been frequently decided.

Semmes vs. *Hartford Ins. Co.*, 13 Wall., 158;
Hanger & Abbott vs. *Hartford Ins. Co.*, 6 Wall., 532;
Dermott & Imes vs. *Hartford Ins. Co.*, 2 Wall., 1.

It is argued that the relief prayed by the complainant ought not to be granted, because the contract on which it is founded lacks mutuality and a sufficient consideration.

This is not an *executory* contract, but one fully executed and as to which there is no allegation of any fraud, contrivance, or unfair influence. The vendor was fully competent to judge of the considerations which influenced his judgment in making the sale, and in such a condition courts of equity will not refuse to lend its aid in enforcing the contract because its terms are unusual or the consideration is inadequate.

Campbell, in his life of the Lord Chancellors, calls attention to the rule rigorously observed by the Earl of Nottingham—never, in the absence of fraud, to interfere

with contracts, or with obligations solemnly contracted. "If a man (said he) will improvidently bind himself up by a voluntary deed, and not reserve liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly."—4 vol., 227.

The doctrine is thus stated by this Court. It is only when the inadequacy of the consideration is so gross as would shock the conscience, and amount in itself to conclusive and decisive evidence of fraud, that the Court would be justified in refusing to enforce the executed contract of parties.

Eyre vs. *Potter*. 15 How., 60.

It is, however, unnecessary to say more as to the validity of the contract or as to the right of the complainant below to have a redemption of the stock under the mortgages executed by May to Pepper, notwithstanding a delay in the payment of dividends, as these questions under precisely the same state of facts were fully argued and considered by the Court in the case of *Dean* vs. *Nelson*. 10 Wall., 170.

Say the Court: "This being a mortgage, whether of real or personal property, the mortgagor has an equity of redemption, unless it has been extinguished in some legal way."

The question then is, has this right been legally extinguished? This brings up the consideration of the proceedings had before the "Civil Commission."

This extraordinary tribunal, as we have seen, was created by the order of a brigadier general, and was composed of a cavalry captain and two civilians.

We assume, as a rule of interpretation, that such a jurisdiction is to receive a strict construction.

The powers specially enumerated are—

1st. The collection of debts.

2d. The enforcement of contracts.

3d. The prevention of frauds.

4th. The recovery of *the possession* of property, real or personal.

The question presented under this 4th head is, had the Court jurisdiction to decree the foreclosure of a mortgage of real estate so as to bar the equity of redemption, that is, to divest the title of A and vest it in B.

If this is to be answered in the negative we submit that the power cannot be sought in the terms of the concluding part of the commission: "and generally to perform such duties and exercise such powers as can be done by a court deriving its powers from military authority."

The circumstances which induced the sale of the stock on the peculiar terms stated in the notes, operated with the parties in the execution of the mortgages. The whole capital of the Gas Company consisted in its real estate and fixtures, necessary to carry on its works. The holder of the stock was regarded as having an interest in the said real estate to the *extent of the shares held by him*, and as security for the payment of the notes the vendor demanded and received from the vendee mortgages on said real estate to so much of the real estate described specifically as is represented by the shares held by him either in law or equity—to have and to hold the same to the only proper use of the said James Pepper, his heirs and assigns forever—and this is coupled with a covenant that May has good right to sell the same, and that the title so conveyed is unincumbered by any act of his, and that he will warrant and defend said Pepper against all claims by, through, or under him.

It is twice repeated, that May conveys the property named in the mortgage "to the extent aforesaid" as tangible property, that is to the *extent of the stock held by him.*

The denial of the jurisdiction on this presentation of the nature of the mortgages was met by a demurrer, which insisted that "in contemplation of law the mortgages created a lien on the *stock only*, and not on real estate." p. 33.

We submit that it is not possible to give this construction to the instruments without violating their express terms. The title to the stock was not transferred by the mortgage, but was left outstanding in the purchaser.

It is true, the commission decided that it was a mortgage of the stock and not of real estate, but the decision of the court in this *regard*, by which it assumed jurisdiction, is not conclusive.

If the mortgages are such as we maintain them to be, then the jurisdiction may now be enquired into.

The strongest application of this principle is to be found in *Rose* vs. *Himley* (4 Cranch, 268), where the decree of a foreign prize court was successfully assailed for want of jurisdiction. See, also, *Thompson* vs. *Whetman*, 18 Wall., 460.

"It is a general rule (says COLERIDGE, J.) that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and, however its decision may be final on all particulars making up together that subject matter, which, if true, is within its jurisdiction; and however necessary, in many cases, it may be for it to make a preliminary enquiry whether some collateral matter be or not within

the limits, yet upon the preliminary question its decision must be always open to enquiry in the Superior Court."

Smith's Lead. Cases, 7 Am. ed., 2 vol., 1109.

Assuming, therefore, that General Veatch had the power to organize this tribunal, we submit that under the jurisdictional clause, "the recovery of the *possession* of property, real and personal," no authority was conferred to foreclose a mortgage of real estate.

But, again, the organizing order required that "*all judgments, decrees, and orders must be reported to the General commanding the district for approval.*

Without this approval, the judgments of this Commission had no validity whatever.

This fact, so vital to the maintenance of the judgment, must be established by competent evidence.

All that we have in the record is a statement in the answer of Dean, not responsive to any allegation in the bill, where, in reciting the proceedings before the "Civil Commission," he says "that May and Kendig having failed to pay any part of the sum so found due to this defendant from said May, the said recorder issued an execution or order of sale on said judgment, *reciting the said judgment aforesaid, and the approval thereof by the said commanding officer.*

This averment of a recital by the clerk is sustained by the transcript of the order of execution by the recorder, in which order it is said "the decree of the Commission in this case was duly approved by Brigadier General Veatch on 14th Nov., 1863."—p. 43.

We maintain that this recital by the clerk is of no validity whatever.

If the judges themselves had certified to this approval, it would have been insufficient.

To maintain the validity of this judgment, the record should exhibit an approval purporting to be signed by the General commanding.

Giving to this mere recital by the Clerk the dignity of a certificate, his powers as Clerk only would extend to the certifying of the proceedings of the "Civil Commission."

He was the recorder of those proceedings, and his certificate of them would be respected everywhere when not assailed on legal grounds.

But when the *judgment of another tribunal* is essential to give validity to these proceedings, that judgment must itself be introduced into the record.

Its absence from the record cannot be supplied by the Clerk's statement, recital, or certificate that such judgment had been rendered.

Where a judgment is relied on as an estoppel, it is not enough to produce a certificate of the result; the exemplification must show that the record is complete.

2 Whart. Ev., S. 824.

A purchaser, when seeking to make title, or when sued for the property purchased, must produce the judgment as well as the execution.

Where the sale was made under a decree of chancery, and the purchaser, in deraigning title, produced a decretal order directing execution to issue on a *prior decree recited* in the decretal order, it was held that the original decree, which was the basis of the execution, should be produced.

Wilson *v.* Conine, 2 John. Rep. 280.

The insufficiency of mere recitals in deeds under tax-titles is fully exemplified in the cases of—

Williams *v.* Peyton, 4 Wheat., 77;

Jackson *v.* Cook., 7 Cow., 88.

Here we are dealing with a tribunal of stinted and limited jurisdiction, whose judgments were without effect until they had been sanctioned and approved by a superior. There being no such approval found in the record of the Civil Commission, their proceedings constitute no bar to the relief now asked for by the complainant.

When the Commission made its rules of procedure, they were submitted to the General commanding, and the record, p. 21, shows the entry "Examined and approved. Signed James C. Veatch, Brigadier General." This entry, or one to same effect, should appear attached to the judgment.

Not only does the authority organizing the Commission require the approval of the officer, but one of the rules specifically states the Commission should send "correct transcripts of the pleadings and interlocutory fiats and orders and final order, judgment, or decree in each case as speedily as possible after trial, to the Commanding General of the district, for his approval or final order, *and for the same to be executed.*" Rule 4, p. 20.

We now deny that this Civil Commission had any jurisdiction whatever of civil causes.

The Federal forces took possession of Memphis on the 6th June, 1862, Major General Hurlburt being the superior officer in command.

From that date to the close of the war communication by post and telegraph between that city and Washington was uninterrupted, and if any necessity existed for such a tribunal, its approval could have been submitted to the President, the Commander-in-chief. This was never obtained, and, as we shall subsequently see, the tribunal was in positive terms repudiated by him.

As we have said, this Commission was established by Brigadier General Veatch, commanding Memphis, while Major General Hurlburt was the commander of the Department.

There is a statement in Dean's answer to the present bill that Veatch organized the Commission by order of General Hurlburt; but this is not responsive to any allegation of the bill, and if this fact be necessary to give validity to the Commission, the party relying upon its udgment must show it by proper evidence.

In an opinion of the Attorney General, 30th January, 1865, in reference to the action of Brigadier General Saxton in South Carolina, who was vested with special powers, and with authority "to make such rules and regulations for the cultivation of the land, and for the protection, employment, *and government of the inhabitants as circumstances may seem to require*," his power to establish a judicial tribunal is denied, and his military rank thus aptly portrayed: "He was not in the position of a general of high rank, at the head of an invading army in the midst of an enemy's country distant from the seat of government, who carries with him, in virtue of his office, a large measure of the authority which resides in the Commander-in-chief, whose powers have no limit, any more than those of the government he represents; who, after he has conquered, has the right, because it is his duty, to govern *pendente bello* the people who are subjected to his control."

Opinion, vol. xi, 155.

It cannot be doubted that if the action of Veatch had been submitted to the Attorney General, it would have been as readily repudiated as was that of Saxton.

The case of Dean *v.* Nelson was rested solely upon the original authority of Veatch. There is not an allusion in the record to Hurlburt's authority or consent, and the argument of Dean's counsel in this Court, claimed legality for such Commission, when established by a military officer, *without regard to his rank.*

Again, if Veatch acted under the authority of General Hurlburt, he would have indicated this in the body of the order or in the signature to it. This we understand to be the universal rule in military affairs.

Still further, this case was tried on facts agreed, and if such a fact as this existed, we should find it in the agreed statement.

The absence of all evidence on the subject justifies the assumption that Veatch acted by virtue of his own authority alone.

If, then, we should admit that such a power exists, it arises by right of conquest, and can only be exercised by the officer commanding the conquering army, as the representative of the commander-in-chief.

The language of the Attorney-General, in the opinion cited, strikingly resembles that of this Court in Mechanics' Bank *vs.* Union Bank, 22 Wall., in which the authority of the commander to organize such a Court was sustained.

The Court say: "General Butler was in the command of the conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was *therefore* invested with all the power of making war, except so far as was denied to him by the commander-in-chief."

Now, if the description of the officer invested with such a power given us by the Attorney-General and by this Court have any significance, it follows that Brigadier General Veatch had no authority for the exercise of this high power.

Let us now review the cases in which this power has been exercised and upheld by the Court.

In *Jecker* vs. *Montgomery*, (13 How., 512), the prize court was established. (TANEY, C.J.:) "By the request of Commodore Biddle, the naval commander of that station, and *sanctioned by the President of the United States.*"

In *Cross* vs. *Harrison*, (16 How., 182), WAYNE, J., refers to the circular of Halleck, Secretary of State for the territory of California, directed to certain persons who had been collectors of customs, in which he recited that the commander-in-chief of the naval forces *had been authorized by the President of the United States* to establish post regulations and also to regulate import duties.

The collection of duties was sustained, on the ground that "*authority for that purpose had been given to the commander-in-chief of our forces on that Station.*" p. 189.

In *Leetensdorfer* vs. *Webb*, (20 How., 176), DANIEL, J., states the case thus:

"Upon the acquisition in 1846 by the army of the United States of the territory of New Mexico, the civil government of this territory having been overthrown, the officer, General Kearney, holding possession for the United States in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained *under the sanction of the authority of the United States*, a provisional and temporary government for the acquired country."

No statement of the facts of this case is given by the reporter, but the head note is as follows:

"The *executive authority of the United States* properly established a provisional government which ordained laws and established a judicial system."

I have examined the printed record filed in this court and find this head note is justified by the facts as recited in the opinion of the court below.

"It is proper (say the court) to dispose of a preliminary objection based on the argument that the Circuit Court of Santa Fé never had a legal existence-"

"In the year 1846 a conquest of this territory was made by the American army under General Kearney. The civil government having been completely overthrown a provisional government was established in its stead by the conquering General *under and by authority of the President of the United States as commander-in chief.*"

Again, it is said.

"Upon the conquest it was competent for *the President* to have abrogated *all laws* then existing in the territory. This power he did not exercise, save so far as *the laws adopted here by his authority* were inconsistent with the existing Mexican laws."

Old. Rec., p. 38.

In these cases, the power is derived *directly* from the President as Commander-in-Chief.

That this important power could only be exercised by him or by his authority, would seem to have been decided in the case of the Grapeshot. (9 Wall., 132.)

" The duty (say the court) of the National Government in this respect, was no other than that which devolves upon the government of a regular belligerent, occupying, during war, the territory of another belligerent. *It was a military duty, to be performed by the President as Commander-in-Chief*, and entrusted as such with the direction of the military force by which the occupation was held."

This tribunal has also been maintained when author-

ized by the military Governor of New Orleans, but this on the ground that his commission from the President expressly conferred the power "*to establish all necessary offices and tribunals.*" See Gov. Shepley's Commission, 3 June, 1862.

So the power unlawfully exercised by Veatch might have been legally exercised by Gov. Johnson under the following commission:

"WAR DEPARTMENT, 3 *March*, 1862.

"*To Hon. Andrew Johnson:*

"SIR: You are hereby appointed Military Governor of the State of Tennessee, with authority to exercise and perform all and singular the powers, duties, and functions pertaining to the office of Military Governor, including the power *to establish all necessary offices, tribunals, &c.*

"EDWIN M. STANTON,
"*Sec'y of War.*"

In all these cases the power was exercised by the President in his own name, as in the establishing of the Provisional Court in New Orleans, or in a direct delegation of it to the military commander or the military governor.

In Mechanics' Bank *Supra*, the court recites the language of the opinion in the case of "Grape Shot," in which the appointment of such a tribunal is held to be "a military duty to be performed by the President as Commander-in-Chief."

In answer to the objection that if the President had the power, still General Butler had no authority—the court uses the language already cited—that he was in command of the conquering and occupying army, commissioned to carry on the war in Louisiana, and *therefore* invested with all the powers of making war, among which the power of establishing courts.

Under these circumstances, the Court say "It must be *presumed* that he acted under the orders of his superior officer, the President."

There is here a clear recognition that this power resides alone in the President as Commander-in-Chief, but under certain conditions this power would be presumed to have been delegated.

There is nothing in this inconsistent with former decisions.

Accepting this as the law, we submit that no such presumption can be made in favor of the acts of Brigadier General Veitch. It cannot be said of him that he was "in command of the conquering and occupying army," or that he was commissioned "to carry on the war" in Tennessee, and that *therefore* he was invested with all the powers of making war, without, indeed, including within the description every officer, however subordinate in rank.

Even if Veatch occupied a like position as was sustained by Butler, no presumption could be made "that he acted under the order of his superior officer, the President," for we propose now to show that the "commission" organized by him was expressly repudiated by the President.

In the publication of the "Digest of Opinions of the Judge-Advocate General," made by the authority of the Secretary of War, at p. 84 will be found the following:

"A 'Civil Commission' composed of civilians and lawyers, exercising all the powers of a common law and chancery court, established by a military commander at Memphis, Tennessee, in 1863, held a tribunal unauthorized by military law."

I have been furnished by the Department with the proceedings on which the judgment was rendered, and print the same as part of my argument."

They show that one Able, at Memphis, dissatisfied with an order made by a "Military Commission," whereby he was compelled to pay a certain sum for damages to goods entrusted to him as a common carrier, appealed to the Department at Washington for redress, asking for an order to restore him the money or for a new trial before the "Civil Commission."

The Judge Advocate General in his report to the Secretary of War, 20th July, 1863, says:

"The precise nature of the 'Civil Commission' alluded to is not known, but it appears to be composed of civilians and lawyers, and to exercise all the powers of a common law and chancery court. If this Commission has been established in Memphis by virtue of any military order, as may be inferred from the papers in the case, it must be held to be an anomalous and irregular tribunal, entirely unauthorized by military law. Such a tribunal has never, it is believed, received the sanction of the War Department or been in any way recognized by it."

The "Civil Commission" alluded to can only take cognizance of the case as a committee of arbitration upon the voluntary submission of both parties, but not upon a reference to it by the Commanding General in any other form or manner.

This report is signed: "J. HOLT,
"*Judge Advocate General.*"

"Report of the Judge Advocate General approved.
"EDWIN M. STANTON,
"*Secretary of War.*"

Again, on the 2d of October, 1863, the Judge Advocate General, on a reference to him of the case of one Orgil, who complained of the action of a tribunal called the "Civil Court," held by the Provost Marshal at Memphis, makes his report to the Secretary, holding that the proceedings were wholly unauthorized, and should be pronounced null and void.

"It is advised, says the Judge Advocate, that this Court, *and any other court or commission which has been instituted by military authority in the District of which General Hurlburt is in command, for the purpose of passing on a civil case, be ordered by the Secretary to be dissolved.*

The wholly irregular and illegal character of the proceedings of these courts when assuming to determine questions of pecuniary liability (other than as a body of arbitrators with the consent of all parties concerned) has been heretofore remarked upon in reports from this office.

In the recent case of Daniel Able where, as in the case of Orgil, a military commission proceeded to render a civil judgment in damages *in invitum*, its action was reported to the Secretary as unauthorized and void, and was thereupon, by general order No. 224 of the War Department of 21 July last, set aside, overruled and held for naught.

The judgment of these tribunals, whether originally attempted to be invested with civil jurisdiction or as "Military" Courts assuming to exercise such jurisdiction, are all alike, unwarranted by law or usage, and their action has become highly detrimental to the public welfare.

This report recommending that these tribunals at Memphis should be dissolved is thus endorsed:

"Approved. Referred to the General-in-Chief to issue an order in conformity to the report of the Judge Advocate General."

"EDWARD M. STANTON."

No argument is necessary to show that this action of the Secretary of War will be held as conclusive and binding as if the order had been signed by the President himself.

The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.

Wilcox vs. *Jackson*, 13 Pet., 511.

We therefore submit that in this case there is no room for the presumption of anything which was made in the case in 22 Wall.

The proceedings of the "civil commission" must, therefore, be wholly set aside in the consideration of the cause, and this being done the present case is in every particular like that of *Deon* vs. *Nelson*, in which the relief now asked for was granted.

The views we have taken as to the illegality of the "civil commission" are sustained by the decision of the Supreme Court of the State in the case of *Heffeman* vs. *Parker*, certified copy of which is herewith filed.

Assignment of Error.

The decree dismissing the bill instead of granting the relief prayed for.

P. PHILLIPS,
For Appellant.

APPENDIX.

UNITED STATES OF AMERICA.

WAR DEPARTMENT.

Washington City, April 3, 1878.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of papers as shown by the records on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the War Department to be affixed, on the day and year first above written.

SEAL.

GEO. W. MCCRARY,
Secretary of War.

JUDGE-ADVOCATE GENERAL'S OFFICE.

Washington, 20 *July*, 1863.

HON. E. M. STANTON,
Secretary of War.

In the case of *Daniel Able*, referred to me for opinion, I have the honor to submit my views as follows: It appears from the accompanying papers that Able is owner of the steamer "Mary E. Forsyth;" that about 10th January last, one Hodges shipped on board said steamer certain merchandise to be conveyed to Memphis; that on arriving at Memphis the boat was, by order of Gen. Grant, pressed summarily into the U. S. service, and the merchandise composing her cargo was at once unloaded and placed on the levee, and that Able thereupon used reasonable diligence to notify Hodges of the disposition and situation of his property.

Further, it is shown that the goods having been damaged while on the levee, a complaint was brought by Hodges against Able before a "Military Commission" in session in Memphis, where a hearing of the case was had and a finding made by the Commission, which "ordered" Able to pay to Hodges "the sum of $\$1{,}751\frac{00}{100}$ in five days from the date of the order."

Further, it appears that Able thereupon (being dissatisfied with the finding which he says was made upon a hearing had in his absence), presented a petition to Major-Gen. Hurlbut, asking that the case might be referred to *another* commission then and now in session in Memphis called a "Civil Commission," to be retired; that Genl. Hurlbut refused to grant the petition but allowed Able a period of twenty days, during which the collection of his claim might be stayed and the matter referred to the Secretary of War.

The informal order of Gen. Hurlbut is in writing and is as follows: "Hd. Qrs. 16 A. Corps, July 6, 1863. The pe- "tition in this case is rejected. Mr. Able can deposit the "money with Pro. Marshall and be allowed 20 days to "prosecute his appeal to the War Department, the orders "from which either staying execution, or referring to civil "tribunal, or opening for hearing are asked.

"S. A. HURLBUT, *Major-General.*"

Upon this peculiar state of facts are submitted the following conclusions:

1. If the sworn statement of Able is true, he is in no way responsible in damages for the injury done to the property in question. He transported it to its destination, and unloaded and placed it on the levee, by order of the military authorities, upon his steamer being pressed into the service of the United States. Proper notice of the situation of the goods was then given to the owner. These circumstances would seem to acquit Able of legal liability; the question, however, is one for a civil tribunal to determine.

2. The "Military Commission" had no jurisdiction whatever of the case. It was not a case in which the United States was a party; nor one involving a military offence or affecting military subjects or relations. It was a case in the nature of a civil suit for damages between citizens, and the commission should have refused to take cognizance of it.

3. The precise nature of the "Civil Commission" alluded to is not known, but it appears to be composed of "civilians and lawyers," and to "exercise all the powers of a common law and Chancery Court." If this commission has been established in Memphis by virtue of any military order, as may be inferred from the papers in the case, it must be held to be an anomalous and irregular tribunal entirely unauthorized by military law. Such a tribunal has,

it is believed, never received the sanction of the War Department or been in any way recognized by it.

4. No military court or officer has authority to issue or order an "execution" to satisfy a judgment in damages, and of course no authority to "stay" an execution as such.

It is therefore recommended that all the proceedings in this case be arrested by the Secretary, and that the money awarded by the commission as damages be ordered to be repaid to Mr. Able.

His case is a proper one to be passed upon by a civil court alone. The "Civil Commission" alluded to, can only take cognizance of the case as a committee of arbitration upon the voluntary submission of both parties, but not upon a reference to it by the Commanding General, or in any other form or manner.

Respectfully submitted,
J. HOLT, *Judge-Advocate General.*

Report of the Judge-Advocate General approved.

EDWIN M. STANTON,
Secretary of War.

BUREAU OF MILITARY JUSTICE, WAR DEPARTMENT.
March 15. 1878,

A true copy from the files of this Bureau.

W. M. DUNN,
Judge-Advocate General, U. S. Army.

MEMPHIS, *July 8th*, 1863.

HON. EDWARD STANTON,
Secretary at War, U. S.

DEAR SIR: I have enclosed to you the petition of Dan. Able, in a case wherein I think it requires your interposition. If you should be of the opinion that the matter should be referred to a civil court, we have such court now organized "as a Civil Commission," with three judges presiding, all of whom are civilians and good lawyers; no injustice can operate to plaintiff nor any pecuniary loss to be sustained, as we have deposited the full amount, $1,751, the amount of the finding of the military commission, and have been allowed by Genl. Hurlbut to present the case for

your order. I hope a trial will be allowed before the "Civil Commission" in this city.

Very truly, your friend, &c.,

(Signed) B. W. SHARP, *Atty. for Deft.*

—

[Enclosures.]

HEAD-QUARTERS 16TH ARMY CORPS.

July 6, 1863.

The petition in this case is rejected. Mr. Able can deposit the money with Pro. Marshal and be allowed twenty days to prosecute his appeal to the War Department, the orders from which either staying execution or referring to civil tribunal or opening for hearing, are asked.

(Signed) S. A. HURLBUT, *Maj. Gen.*

A true copy.

(Signed) CHS. E. HOWE, *Capt. Asst. Pro. Mar. District Memphis, 6th July*, 1863.

—

To the HON. EDWARD STANTON,
Secretary at War, U. S. of America.

Daniel Able respectfully represents that he is and has always been a loyal citizen of the United States; that he is a resident of the city of Memphis; that on or about the 10th day of Jan., 1863, he was and still is the owner of the steamer Mary E. Forsyth; that on a trip from Cairo to Memphis on the date aforesaid, one George Hodges shipped on said boat a lot of goods to be delivered at the city of Memphis; that said goods consisted of merchandise and *ale*; that upon the arrival of the boat at Memphis, by order of Maj. Gen. U. S. Grant said boat was pressed into the Government service, and that said goods, wares, and merchandise were put upon the levee at Memphis by order of the Government authorities, and the boat was immediately put into the service as aforesaid; that your petitioner used every diligence and effort to give said Hodges notice of the situation of his said goods.

Your petitioner further states, that he does not know of his own knowledge to what extent said goods were damaged, but believes same was considerable; that said Hodges brought his complaint before a military commission in this

city; that in the absence of petitioner evidence was heard and a finding made by said commission ordering petitioner to pay the sum of $1,751 in five days from date of order.

Your petitioner presented by petition to Maj. Gen. S. A. Hurlbut, asking a reference of this case to the civil commission now in session in this city, having and exercising all the powers of a common law and Chancery Court; the prayer of petitioner was simply to have the case fully and fairly tried before a civil tribunal where justice could be administered according to the rules of law which should govern such cases.

The petition was rejected by Gen. H., but a stay of execution was granted for twenty days in order that the petition might be sent to you. I respectfully pray that you will order that this case with all the papers, &c., be sent to the civil commission in this city for trial, or to the courts at St. Louis, Mo., if you think it more advisable. Your petitioner states that he has a good defense to the action, and has already deposited in cash $1,751 with Provost Marshal as security to plaintiff, Hodges, and will allow the same still to remain in his hands until a trial can be had. As the time allowed to obtain your answer is very short, please answer at first convenience.

Daniel Abel makes oath and says the facts, matters, and things as above stated are true.

(Signed) DANIEL ABLE.

Sworn to and subscribed before me this 7th day of July, 1863.

(Signed) WAGER SWAYNE,
Col. 3d Ohio Vols., District Provost Marshal.

P. S. Please send answer to B. W. Sharp, Esq., my attorney at this city.

(Signed) D. A.

—

[Endorsement.]

Respectfully referred to the Judge Advocate General for his views in the premises.

By order of the Secretary of War.

(Signed) JAS. A. HARDIE, *A. A. G.*

War Department, July 18, 1863.

—

[NOTE—For opinion of the Judge Advocate General, see detached copy furnished from Bureau of Military Justice.]

[Telegram.]

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE.
Washington, July 21, 1863.

MAJOR GENERAL STEPHEN A. HURLBUT,
Memphis Tenn:

The Secretary of War orders that the proceedings of a commission held in Memphis in the case of Daniel Able, be set aside, annulled, and held for naught, and that the money deposited by order of the commission be restored to the owner; the commission having no jurisdiction or authority for their proceedings in said case.

(Signed) E. D. TOWNSEND,
Asst. Adjutant General.

GENERAL ORDERS, No. 224.

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
Washington, July 21, 1863.

It is hereby ordered that the proceedings of a Commission held in Memphis, Tenn., in the case of *Daniel Able*, be set aside, annulled, and held for naught; and that the money deposited by order of the Commission be restored to the owner, the Commission having no jurisdiction or authority for their proceedings in said case.

BY ORDER OF THE SECRETARY OF WAR:

E. D. TOWNSEND,
Assistant Adjutant General.

JUDGE-ADVOCATE GENERAL'S OFFICE.
Washington, 2d October, 1863.

Respectfully returned to the Secretary of War.

The action of the so-called "civil court" held by the Provost Marshal at Memphis, in the case of *Mr. Orgill*, was evidently wholly unauthorized and should be pronounced null and void. It is advised that the court, and any other court or commission which has been instituted by the military authority in the district of which Maj. Genl. Hurlbut is in command for the purpose of passing upon civil cases, be ordered by the Secretary to be dissolved. The wholly irregular and illegal character of the proceedings of these courts, &c., when assuming to determine questions of pecu-

niary liability (other than as a body of arbitrators with the consent of all the parties concerned) has been heretofore remarked upon in reports from this office.

In the recent case of Daniel Able, where, as in the case of Orgill, a military commission proceeded to render a civil judgment in damages *in invitum*, its action was reported to the Secretary as unauthorized and void, and was thereupon, by General Orders, No. 224 of the War Department, of 21st July last, "set aside, annulled, and held for naught."

The judgments of these tribunals, whether originally attempted to be invested with civil jurisdiction, or as "Military" Courts assuming to exercise such jurisdiction, are all alike unwarranted by law or usage, and their action has become highly detrimental to the service and to the public welfare.

J. HOLT, *Judge-Advocate General.*

Approved. Referred to General-in-Chief to issue an order in conformity with report of Judge-Advocate General.

(Signed) EDWIN M. STANTON.

BUREAU OF MILITARY JUSTICE, WAR DEPARTMENT.
March 15, 1878.

A true copy from the files of this Bureau.

W. M. DUNN,
Judge-Advocate General, U. S. Army.

Supreme Court of the United States.

T. A. KENDIG,

Appellant.

vs.

THOMPSON DEAN,

Appellee.

BRIEF OF H. T. ELLETT

FOR APPELLEE.

Tract & Co. Printers, 49 Second St. Memphis

Supreme Court of the United States.

T. A. KENDIG,
Appellant,
vs.
THOMPSON DEAN,
Appellee.

BRIEF FOR APPELLEE.

I.

The Appellant, who was complainant below, did not make, either by his pleadings or his proofs, such a case as to entitle him to relief in equity, without reference to the defence set up affirmatively by the answer.

The bill alleged that Kendig, on the 22d of March, 1862, became and was the owner of 184 shares of the capital stock of the Memphis Gas Light Company; that on that day his name was entered on the proper books of the company as the owner, and a certificate in regular form issued to him by the proper officers of the company. This original certificate is exhibited as a part of the bill, marked Exhibit A, (Record p. 2).

The bill further alleged that in July, 1862, the defendant,

Dean, obtained possession of the books and control of the officers of the Gas Company, and being so in possession and control, wrongfully and fraudulently procured and obtained to be made on said books, a transfer of said shares to his own name as owner, from the name of said Kendig; and also procured the cancellation of the certificate belonging to Kendig, and the issuance of a new certificate to himself, and that such transfer was obtained and made without the authority or consent of complainant, and without any purchase or transfer from him, and without any valid, rightful or lawful authority of any kind.

Dean alone is made defendant, and the prayer is that his title may be divested, and vested in complainant; that he be required to transfer the stock on the books of the company; and that the stock may be restored to complainant and decreed to be his property.

---

1. It will be observed that the averment of the cancellation of Kendig's certificate of stock, through the instrumentality of Dean, is fully contradicted and disproved by other parts of the bill itself. The original certificate, still in the possession of Kendig, is produced, unmutilated and uncanceled, and made a part of the bill as an exhibit.

2. There is no proof whatever in support of the allegation, that Dean, by means of his possession of the books and control of the company or its officers, procured Kendig's name to be erased from the stock book, and a transfer of the stock in question to be made on the books to himself. All the averments on this subject are denied by the answer, except that Dean admits having had the custody of the books, and the control of the affairs of the company, by virtue of a military order, from the 9th of December, 1862, to the 28th of February, 1863. The stock actually stood in the name of Kendig on the books until the 28th of November, 1863, when it was transferred to Barelay under judicial proceedings.

Indeed, the real facts of the case seem to have been carefully excluded from the bill, and the actual claim of Dean, as disclosed by his answer, and well known to Kendig, is not at all

assailed by the pleading. The facts should have been set forth truly, and the grounds stated on which the right claimed was sought to be avoided.

Instead of this, the complainant, passing entirely over the case made by his bill, seeks to prevail on the supposed weakness of the matters of defence set up by the answer. This he cannot do. He is confined to his case as stated, and cannot resort to the answer or proofs to obtain relief on other grounds not set forth in the bill.

Story Eq. Pl. secs. 28, 32, 40, 42, and 257.
English vs. Foxall, 2 Peters, 595.
Jackson vs. Ashton, 11 Peters, 249.
Texas vs. Hardenberg, 10 Wallace, 86.
Mitf. Eq. Pl. 363. 2 Dan. Ch. P. 814.

3. Again, suits in equity cannot be sustained in the courts of the United States when "a plain, adequate, and complete remedy may be had at law."

Judiciary act of 1789, sec. 16.

This objection may be taken after answer to the merits, and will even be raised by the court of its own motion.

Hipp vs. Babin, 19 How. 271.

Now Kendig does not complain of any wrong committed by Dean, for which he cannot have a complete remedy at law.

He holds his original certificate for 184 shares of Stock. He does not allege or suggest that the Gas Company disputes its validity, or has ever hesitated to accord to him his full rights as a stockholder, in voting and receiving dividends.

If it were true, as charged, that the Gas Company, or its officers, at the instigation of Dean, erased Kendig's name from the stock book, that would hardly be an actionable wrong, unless the Company went further, and denied him his rights as a stockholder, which is not alleged. Unaccompanied by such denial the mere erasure would be *damnum absque injuria*.

But, if a tort for which an action would lie, the remedy would be by a suit at law against the company, or Dean, or both, to recover damages; or, perhaps a bill in equity could be brought by Kendig *against the Company*. to compel the restoration of his name to the stock books.

If the Company denied him his rights as a stockholder, and refused to pay him his dividends, or to allow him to vote his stock, his remedy, whether at law or in equity, was against the Company, and not against Dean.

It is further alleged that the Gas Company not only erased Kendig's name from the stock book, but also unlawfully issued to Dean a certificate for the same number of shares held by Kendig; and the specific prayer of the bill is that Dean be required to transfer to Kendig on the books of the company, these particular shares mentioned in said last named certificate.

What right has Kendig to these latter shares? He already holds one certificate, the genuine original certificate issued to him, and now in perfect preservation, and he certainly has no right to another for the same number of shares. The issuance of this alleged fraudulent certificate to Dean did not operate to divest or impair the rights of Kendig to any shares owned by him. It was no more a wrong to Kendig than it was to every other stockholder, and he has no better right than any other stockholder to have these shares transferred to himself. On the theory propounded by the bill, this second certificate was wholly void, having been fraudulently and unlawfully issued. How then can it be decreed to be transferred by Dean to Kendig as representing so much valid and lawful stock? If so decreed and transferred, then Kendig will be the owner of, and will hold valid certificates for 368 shares, when he only claims to own 184 shares, for which he already holds a regular and proper certificate.

It might be easy to conceive of a bill brought, on the principle asserted in Dodge vs. Woolsey, 18 How. 331, where the directors by collusion or otherwise, refuse to perform a duty properly devolving on them, by a stockholder against the company and Dean to have this certificate, if unlawfully issued, surrendered and cancelled as

fraudulent and void; but for Kendig to go against Dean alone, to have this alleged fraudulent and void certificate transferred to himself, on the ground that he is the equitable and proper owner of it, when he already holds one valid certificate for all the stock he claims to own, appears rather an extravagant pretension.

It seems safe therefore to assume that if all the facts alleged in the bill were admitted to be true, precisely as stated, no relief could have been given, and that the bill was properly dismissed. Indeed the demurrer to it ought to have been allowed.

II.

We insist that the defence set up affirmatively by the answer was sufficient in law, and true in fact.

It appears that the General commanding the United States forces in the Military District of Memphis, which embraced a large and populous city, and was then held in firm military occupation, by his order dated April 25, 1863, created a legal tribunal called a "Civil Commission," for the general administration of justice in civil causes in said District.

The following is a copy of the order referred to :

HEAD QUARTERS, DISTRICT OF MEMPHIS,
Memphis, Tenn., April 25th, 1863.

Special Orders No. 247.

A Civil Commission is hereby organized for the District of Memphis, Tenn., to hear and determine all complaints and suits instituted by loyal citizens of the United States, for the collection of debts, the enforcement of contracts, the prevention of frauds, the recovery of the possession of property, real or personal, and generally to perform such duties, and exercise such powers as can be done by a court deriving its powers from military authority. The Commission will adopt such rules and regulations for the transaction of business as may be found necessary, subject to the approval of the general commanding the District. All judgments, decrees, and

orders, must be reported to the general commanding the District, for approval.

DETAIL FOR THE COMMISSION.

1st.—Captain Barbour Lewis, 1st Missouri Cavalry.
2d.—Judge Joseph Williams.
3d.—A. C. Ketchum, Esq.
Lieut. John C. Grierson, 6th Illinois Volunteer Cavalry.

The commission will meet in the Chancery Court Room in Memphis, on Monday, the 27th day of April, 1863, and hold its sessions without regard to hours.

By order of Brig. Gen. JAMES C. VEATCH.

F. W. FOX,
Assistant Adjutant General.

This tribunal was immediately organized, rules to regulate the practice and proceedings therein were adopted and promulgated, and for more than two years it continued in the exercise of its jurisdiction, adjudicating numerous controversies, and executing its judgments and decrees.

The jurisdiction was not confined to suits brought by persons residing or being within the district. The preamble of the rules, which was examined and approved by the commanding general, shows that it extended to "all suits instituted by citizens of this or other states, but loyal to the government."

On the first of September 1863, Dean brought a suit before this tribunal against May and Kendig, to foreclose a mortgage on the 184 shares, now in question, of the stock of the Gas Light Company. A decree of foreclosure, and for the sale of the stock, was regularly obtained. The sale was made, and the stock was purchased by one Barclay, to whom, by order of the court, it was transferred on the books of the company, and a certificate issued, and by whom the said stock was afterwards transferred to Dean.

This case does not encounter the difficulty about jurisdiction that existed in the cases where the defendants had been expelled

from the lines of military occupation, and prohibited from returning; and where the only notice of the suit was by publication in a newspaper, which it was unlawful to carry beyond the lines.

Dean vs. Nelson, 10 Wall. 158.
Ludlow vs. Ramsey, 11 Wall. 589.
Lasere vs. Rochereau, 17 Id. 437.

The proceedings in this case were regular. May was an unnecessary, or at most a merely formal party. He had parted with all his interest to Kendig, and he does not complain of the decree. Besides, the reason of his absence does not appear, and it is not shown that it was not voluntary.

Kendig, the only real and material party, was present within the jurisdiction of the court, was personally served with process, appeared in person and by counsel, answered to the merits, and defended the suit. It is true that at the close of his answer, and again by amended answer, he objected to the jurisdiction on the special ground only that the decree would necessarily involve a sale of an interest in the real estate of the Gas Company, which, he contended, the court had no power by the terms of the order creating it, to decree. This objection was unfounded, and it conceded the legitimate powers of the tribunal in other respects.

Unless, then, the tribunal itself was a mere usurpation, having no lawful existence, and wholly destitute of power or authority, rights derived under its decrees must be upheld, so far as the proceedings were within the jurisdiction conferred upon it.

The proposition that it was competent for the military commanders, during the late war, to establish courts for the administration of justice in civil and criminal cases, in conquered portions of the insurgent States, occupied by the National forces, ought to be considered definitely settled in this Court, at least since the case of *Mechanics Bank vs. Union Bank, 22 Wallace, 276.*

But as the present appeal is apparently brought for the purpose of challenging that decision, we may perhaps be pardoned for bringing forward again some of the authorities that bear upon the subject.

By the common law of England, the King, as the head of the Executive Department, has the right, in the first instance, to legislate for conquered countries.

In *Campbell vs. Hall*, 1 Cowper, 204, 213, where the question was whether the King could, by letters patent, abolish the French laws, and substitute new regulations in the island of Grenada, then recently conquered from France, Lord Mansfield, delivering the unanimous judgment of the King's Bench, said: "No question "was ever started before but that the King has the right to a legis- "lative authority over a conquered country; it was never denied in "Westminster Hall; it was never questioned in Parliament. Coke's "report of Calvin's case (7 Rep. 17, b.) lays it down as clear."

In *Smith vs. Brown*, 2 Salk. 666, Lord Chief Justice Holt said: "The laws of England do not extend to Virginia; being a "*conquered country* their law is *what the King pleases;* and we can "not take notice of it but as set forth."

In *Barwis vs. Keppel*, 2 Wilson, 314, Lord Camden said: "*Fla-* "*grante bello* the common law has never interfered with the army; "*inter arma silent leges.*" And again: "When his army is out of "his dominions, the King acts by virtue of his prerogative."

This principle has been repeatedly held applicable in determining the powers of the Executive under our form of government.

In *Jecker vs. Montgomery*, 13 How., 498, it was decided that the adjudication of a *Prize Court*, created by order of the President, and held at Monterey, in Mexico, while occupied by the American arms, was void. This court say: "Neither the President, nor any military officer, can establish a court in a conquered country *and* authorize it to decide upon the rights of the United States, or of individuals, *in prize cases*, nor to administer the *law of nations.*"

This decision is, however, carefully restricted to a denial of the power of the military arm to create tribunals for the purpose of adjudging *prize cases*, and other cases *arising under the law of nations.*

It expressly recognizes a different class of "*courts established or*

sanctioned in Mexico during the war, by the commanders of the American forces." Of these it says, "they were nothing more than the "agents of the military power to assist it in preserving order in the "conquered territory, and to protect the inhabitants in their persons "and property while it was occupied by the American arms. They "were subject to the military power, and their decisions under its "control, etc." And it is added, "*they* could not adjudicate a question of *prize or no prize.*"

The legitimacy of these "courts," established by the "commanders" as their "agents" for the purposes mentioned, is not at all discredited in this opinion, but is rather conceded. Certainly no countenance is given to the idea that these "courts" and their "decisions," though subject to the military power, are or were unlawful and void.

And the power of the President, and of the military commanders in the field, to create such courts has since been fully vindicated and acquiesced in.

In *Cross vs. Harrison*, 16 How., 164, the question was in regard to duties collected on goods imported into San Francisco, after the signing of the treaty of peace with Mexico, on the 3d of February, 1848, by which Upper California had been ceded to the United States; and before 13th of November, 1849, when the regular U.S. Revenue Collector entered on his duties, Between these dates (as previously) duties had been collected by the officers of the Provisional Government established by the Military and Naval officers, and the point made was only whether the powers of that Provisional Government *continued after the signing of the treaty of peace.*

The court say, (p. 190), "early in 1847 the President, as con- "stitutional commander in chief of the army and navy, authorized "the military and naval commander of our forces in California to "exercise the belligerent rights of a conqueror, and to form a civil "government for the conquered territory, and to *impose duties, &c.* "* * * * * No one can doubt that these orders of "the President, and the action of our army and naval command- "ers in California, in conformity with them, was according to the "law of arms, and the right of conquest, or that they were opera- "tive until the ratification and exchange of a treaty of peace."

The court then go on to hold that this military government, thus created, continued to exist as a *de facto* government, after the treaty of cession, until Congress legislated to the contrary, and that it had the right to levy the taxes complained of.

This case fully recognizes the doctrine that, under our system, the commander in chief of the army has the right to establish civil government in conquered territory; and it shows that the limitation of this power, as expressed in *Jecker vs. Montgomery*, only extends to *prize courts*, to determine questions of prize, and similar questions arising under the law of nations.

Leitensdorfer vs. Webb, 20 How. 177, is to the same effect. The court say, "upon the acquisition in 1846, by the arms of the United States, of the territory of New Mexico, the civil government being overthrown, the officer, Gen. Kearney, holding possession for the U. S., in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional government for the acquired territory."

Gen. Kearney in fact ordained an entire code of laws for New Mexico, and appointed all officers, executive and judicial, necessary and proper to carry on the government; and it was held by this court that the government and laws, so created and ordained, continued in force after the war, until revoked or modified by Congress, or by the territorial legislature.

The history of the late civil war abounds with examples of the same kind.

In October, 1862, the President, by an "Executive order," created a Provisional court in New Orleans; defined its jurisdiction, civil and criminal; and appointed the judge.

In *Cocks vs. Izard*, 7 Wall. 559, the validity of a sale, made under a decree of this Provisional court was attacked, on the ground of the illegality of the tribunal; but the question was waived, and relief granted on general principles of equity jurisprudence.

In *The Grapeshot*, 7 Wall. 563, another judgment of the same Provisional court was questioned, on a motion to dismiss an appeal. The motion was overruled because the judgments and decrees of said court had, in pursuance of an act of Congress, been transferred to the Circuit Court, to stand as the judgments and decrees of the latter court. The appeal was taken as from a decree of the Circuit Court, and was therefore regular. But all questions concerning the validity of judgments and decrees of the Provisional Court were left open until after final hearing.

At the same term, it was said in *Texas vs. White*, 7 Wall. 700, 730, "so long as the war continued, it cannot be denied that the President might institute temporary government within insurgent districts, occupied by the national forces."

When the case of *The Grapeshot* came to be finally heard, (9 Wallace, 129, 133), the power of the President to establish the court in question was declared to be beyond doubt, and the case of *Leitensdorfer vs. Webb*, sustaining the authority of the officer holding possession for the United States, to establish a Provisional Government for New Mexico, was cited with approbation as a contolling authority.

This decision was not influenced by the act of Congress of July 28th, 1866; for while legislation may cure irregularities and defects in the proceedings of courts, it cannot impart validity to that which is null and void.

Cooley Const. Lim. 369 to 383.
Pryor vs. Downey, 50 California, 388.
Grove vs. Todd, 41 Md. 633.
3 Am. Law Times Rep. (1876) pp. 59 and 68.

In *United States vs. Reiter*, 4 Am. Law Reg. N. S. 534, Judge Peabody, in an elaborate and unanswerable judgment, reviewed the whole subject, and successfully demonstrated the legality of his court, and its rightful jurisdiction even in cases of capital offences.

In *Burke vs. Miltenberger*, 19 Wall. 519, the constitutionality of this Provisional Court was again affirmed—its establishment being declared to be "a rightful exercise of the Constitutional authority

of the President during a state of war." And it was further held that it was not dissolved by the proclamation of peace in Louisiana, dated April 2d, 1866, but continued a court *de facto*, until dissolved by the act of Congress of July 28th, 1866, transferring its business to the proper courts of the United States.

In *Handlin vs. Wickliffe*, 12 Wall. 173, it appears that Gen. Shepley, military governor of Louisiana, commissioned Handlin as Judge of the Third District Court of New Orleans. Hahn who, by appointment of the President, succeeded Shepley as military governor, removed Handlin, and appointed Wickliffe. The court held that both the appointments and the removal were authorized by the necessities of military occupation, and were lawful and proper.

Pennywit vs. Eaton, 15 Wall. 382, involved the validity of a judgment of the Fourth District Court of New Orleans, assailed on the ground that it was rendered by a judge appointed by one of these military governors. The court said, "we have already decided that such appointments were within the power of such a governor," citing Handlin vs. Wickliffe, Leitensdorfer vs. Webb, and The Grapeshot.

The validity of this Civil Commission, established in Memphis, was fully in issue in the case of *Dean vs. Nelson*, 10 Wall. 158, but was not decided. Judge Bradley said: "It is objected that the court, or Civil Commission, was not legally established; but it is unnecessary to determine that question, as the proceedings themselves were fatally defective."

It is respectfully submitted that all the legal principles involved in the question, have been fully settled in favor of the validity of this tribunal, by the decisions already quoted.

This conclusion is also maintained by approved text writers, and by essayists, and also by some of the State Courts.

Halleck's Internat. L. 775, 780, 784, 786.
Southern Law Rev. Apl. 1873, p. 332, 333.
Wheaton (by Dana) Note to § 347, bottom page 437.

The authority of Andrew Johnson, who was appointed military governor of Tennessee by Mr. Stanton, then Secretary of War, to appoint Aldermen and members of the Council for the City of Nashville, was uphled by the Supreme Court of that State in the case of *Rutledge vs. Fogg*, 3 Cold. 554, 561.

And so the power of the same Governor to order an election for Clerk of the County Court of Obion County, was asserted in Isbel vs. Farris, 5 Cold. 426.

The acts of Judge Sharkey, as military governor of Mississippi, in creating courts, defining their jurisdiction, and appointing judges, by his mere order, were recognized as legitimate by the High Court of Errors and Appeals of that State, in *Scott vs. Bilgerry*, 40 Miss. 119.

The Supreme Court of Tennessee unanimously affirmed the validity of this particular "Civil Commission," in the case of *Heffer-man vs. Porter*, 6 Cold. 391; but that decision, after a change of judges, was reversed, and all the acts of that tribunal were pronounced to be null and void. *Walt vs. Thomasson*, Ms.

In Hefferman vs. Porter, and in the previous Tennessee cases cited, the court had followed *haud passibus equis*, the same line of argument pursued by this court in all the cases from *Cross vs. Harrison* to the *Mechanics Bank vs. Union Bank*. They were all at last reversed, professedly on the authority of two opinions given by the Judge Advocate General to the Secretary of War, shortly after this Civil Commission was created, in which such tribunals, if established by "*any military order*," were pronounced to be "anomalous and irregular, entirely unauthorized by military law;" and "alike unwarranted by law or usage, and highly detrimental to the service, and to the public welfare." The court, in assuming to follow these opinions, than which they say "it is impossible to conceive of higher authority on the question," attach a most important qualification to them, when they say that the learned Judge Advocate General only meant to be understood as denying "the right of a "*Commander of a District* to establish a Civil Commission to try civil causes, *without the authority of the war department.*"

It is submitted that no such restriction can fairly be placed on his language, which certainly declares that *no military order whatever*, no matter by whom issued or authorized, can, according to the laws and usages of war, create tribunals for the trial of civil causes, in conquered districts held by arms. His observations are general and abstract. He had no reference to the precise nature of the civil commission alluded to, nor to the authority by which it was created, for on these subjects he expressly states that he had no information.

The court concede that the Commander in Chief might authorize the War Department, or a Military Governor, to create such tribunals; and they assert that the appointment of a Military Governor with such power is incompatible with the existence of similar authority in the Commander of a Department.

This view necessarily claims that a Military Governor, in time of actual war, who is usually appointed by the Commander of the Department, is in some respects superior to the Commanding General himself, and is exclusively vested with at least a portion of the military command. And it concedes that such civil tribunals are not "irregular or anomalous, or contrary to military law and usage," but makes the question of the validity of the particular court depend on whether it was created by this or that subordinate officer.

The whole argument is unsound.

Whatever may have been the powers conferred on Johnson as military governor, they were derived from a military order, and were liable to be revoked or modified at any time. They were in fact partially revoked or modified, by implication at least, whenever anything that invaded or conflicted with the powers so granted, was done by any other officer, with the express or implied authority of the Commander in Chief.

Had the President expressly conferred on Gov. Johnson the *exclusive* power to create civil tribunals in Tennessee, even that order would have been qualified, and *pro tanto* revoked, by the exercise of the same power by another officer, with the knowledge and approbation of their common superior.

An act done by any military officer by the command of the President, is not unlawful because of the existence of a previous order giving to a different officer the exclusive power to do that act. And this is equally true of acts done by an officer without the positive command, but with the knowledge and approbation of the Commander in Chief, whether that approbation be expressly given, or only implied from the failure to disapprove after full knowledge of the facts. Such acts are valid and effectual notwithstanding the same duties may have been before confided to another officer. The powers of a Military Governor are not Constitutional powers, that, once conferred, can only be taken away by Constitutional amendment.

The conduct of Gen. Veatch in creating this court had the approval of the War Department, by long acquiescence, with full knowledge of the facts, and after careful consideration of its propriety. It was never disapproved by the Military Governor, or by the Secretary of War, or by the President, and none of these officers ever took any steps to abolish the tribunal.

Efforts were indeed made to have it abolished, but in vain. Its existence was brought to the notice of the War Department in the most imposing form, in less than three months after its creation. The complaint of Able went to the Secretary in July, and was referred to the Judge Advocate General. He reported, as already shown, that the tribunal itself was anomalous and irregular, and in violation of military law and usage, and recommended that it be promptly abolished. But the Secretary, instead of disapproving the action of Gen. Veatch, and abolishing the court, contented himself with granting relief in the particular case, and left the tribunal in existence, and in the full exercise of its large jurisdiction, until the summer of 1865, when it expired with the military authority that created it.

The complaint of Orgill went up in October, 1863, and the Judge Advocate General, to whom it was referred, repeated his recommendations with renewed emphasis, but they were again disregarded by his superior, the Secretary of War; and this tribunal actually sat, side by side with the regular courts of the State and of the United States, until some time in the summer of 1865; and during

its existence adjudicated rights of property to an almost incalculable amount, and its judgments have been generally acquiesced in. The only instances in which they are known to have been questioned in the State courts, are the cases of Hefferman vs. Porter, and Walt vs. Thomasson.

By the failure of the Secretary of War to adopt the views of the Judge Advocate General, and to cause this Civil Commission to be abolished, the act of Gen. Veatch was ratified and approved, and the court was invested with all the sanctions that would have surrounded it, if it had been created in obedience to the previous express orders of the President. In military affairs, as in civil, the omission of the superior authority promptly to disapprove the acts of the inferior, necessarily amounts to approval and ratification.

It is upon this very principle that the validity of the appointment of Johnson as Military Governor depends. The President, as Commander in Chief, is the source and fountain of all mere military power, and by a convenient fiction, the acts of all his subordinates, in the prosecution of war, are considered to be the acts of the President himself, unless disavowed and repudiated.

The appointment of Johnson was not the personal act of the President, but of Mr. Stanton, Secretary of War. It did not on on its face purport to be made with the knowledge or approbation of the President. The following is a copy, as published in the acts of the Legislature of Tennessee, passed at a session held in April, 1865, under the authority of Gov. Johnson, (page 1):

WAR DEPARTMENT, March 3, 1862.

To the Hon. Andrew Johnson:

SIR:—You are hereby appointed Military Governor of the State of Tennessee, with authority to exercise and perform within the limits of that State, all and singular the powers, duties and functions, pertaining to the office of Military Governor, including the power to establish all necessary offices, tribunals, etc.

EDWIN M. STANTON,
Secretary of War.

As the Secretary of War has no independent power, as such, to appoint Military Governors, it is clear that this appointment was valid only because, by virtue of the fiction referred to, it is to be taken as the act of the President himself.

Every military commander is invested with a large discretion, and possesses within the limits of his command, all the powers of the President, as Commander in Chief, under the laws and usages of war, unless restrained by orders or regulations, or by the peculiar nature of the duties with which he is charged. This principle is absolutely essential to the successful prosecution of war, and it is supported by authority.

In *Planters Bank vs. Union Bank*, 16 Wallace, 495, the court in approval of the argument of counsel (p. 490) that Gen. Banks could do whatever the Chief Executive could do if personally present. said: "As the war had not ceased, though it was not flagrant in the District, and as Gen. Banks was in command of the District, it must be conceded that *he had power to do all that the laws of war permitted*, except so far as he was restrained by the pledged faith of the Government, or by the effect of Congressional legislation." The order of Gen. Banks was held void in that case, because it was in conflict with the acts of Congress on the subject of confiscation of enemy's property.

The Supreme Court of Tennessee expressed this principle when holding that the commander of a Post "has the right to exercise all "the discretionary powers of a commander coming within the "scope of his military duty. For the proper exercise of this dis- "cretion he is responsible alone to his superiors in command." "* * * "The commander of a detached Post has for "the time, within the limits of his command, the same powers and "discretion as the commander of a Department."

Sutton vs. Tiller, 6 Cold. 595.

This principle is reasserted in the Mechanics and Traders Bank vs. Union Bank, in reference to the act of Gen. Butler in the creation of a civil court in New Orleans, and it is said "it must be presumed that he acted under the orders of his superior officer, the

President, and that his acts, in the prosecution of the war, were the acts of his Commander in Chief."

Shortly after the decision of the Supreme Court of Tennessee in *Walt vs. Thomasson,* the same judges expressed the following sound and catholic views, quite at variance with the narrow and technical reasoning employed in that case. In *The State ex rel. Kain vs. Hall,* Ms., they say:

"There can be no question at this day, that the conquering power, in the possession of the conquered territory, has a right either to adopt the tribunals of justice already existing, or to abolish them and create others in their stead. Thus it is said, the laws, usages and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign. *Calvin's case,* 7 Coke 17, 9 Pet. 711. There is no doubt of his power to change the laws of the conquered country unless restrained by the capitulation or treaty. In the case of a country acquired by conquest, said Chancellor Walworth, no formal act of legislation is necessary to change the law; the mere will of the conqueror is enough, 7 Wend. 587, 1 Kent Com. 181. We need not multiply authorities upon this familiar principle of the laws of war. It is a principle quite as old as the law of nations, that the conquering power may create tribunals to endure during the hostile occupation, to try civil and criminal causes, and to protect for the time the rights of life and property, Hall. 782, 783, and these principles applied with peculiar force to the late civil war in this country. The theory was that it was necessary that the State government should be in active operation in conformity with and subordinate to the constitution of the United States, for the administration of the internal affairs of each State. Until this was so, the country held by the United States forces, and its inhabitants, were held under the forcible or military government of the republic, as far as necessary, although that government is exercised by civil officers and civil methods. Wheat. Inter. Law 15. And it makes no difference what these tribunals are called, whether circuit court or civil commissions, so that they be constituted by competent military authority. This court has recently said that the civil commission appointed by Andrew Johnson in West Tennessee, for the trial of civil causes under his commission from the President, as Com-

mander in Chief of the army, were, under the laws of war, valid organizations, and that their judgments could not be impeached on the ground that the military governor had no power to constitute them. *West vs. Thompson*, Mss. Jackson 1872. Although this was said *arguendo*, and could not technically be considered as a binding authority, yet it was said upon due consideration in a case involving a general view of the subject of military tribunals in a time of war. As unpalatable as such a doctrine must be in this country, where liberty, regulated by law, has been the rule, and arbitrary restraint the exception, yet under the laws of war we must accept it as true. Those tribunals have in divers ways been recognized by this court, and treated as lawfully constituted tribunals; and if for no other reason, this ought to be so upon considerations of public policy, and for the sake of public repose. We have had before us in this court many important causes where judges, having no other ensign of office than a commission of the military governor in time of war, rendered judgments which we have reversed or affirmed—duly recognizing these persons as *de facto* judges. Our immediate predecessors upon this bench set a commendable example in suffering many things done during the war, which were by them deemed unlawful, to remain in absolute repose, because they were 'accomplished facts.' Following this example, and for the same reasons among others herein stated, we cannot and will not disturb the public repose, unsettle titles, and bring our social fabric into chaos and confusion, by pronouncing as an unlawful usurpation the exercise of judicial functions, which under the laws of war, were lawful at the time."

There can be no middle ground assigned to judicial proceedings which are irreversible for error; it is a record, imputing absolute verity; or mere waste paper.

Voorhees vs. Bank U. S., 10 Peters, 475.

On the whole it may be safely assumed,

1. That the laws and usages of war do authorize the creation of such tribunals as this Civil Commission.

2. That the President may, by his own act, without regard to official forms, create such tribunals.

3. That they may be called into life without the personal act of the President, by the agency of the Military Commanders within their Districts.

4. That it is not necessary that there should be any express order or authority from the President beforehand, or any express ratification afterwards.

5. That the power is vested in the Military Commanders of Districts or Departments, to be exercised in their discretion, subject to the approval or disapproval of their superiors.

6. That all such acts are valid unless disapproved by the superior authority.

H. T. ELLETT,
For Appellee.

Supreme Court of the United States.

No. 60.

T. A. KENDIG

vs.

THOMPSON DEAN.

ADDITIONAL BRIEF FOR APPELLEE.

The original brief in this case was printed before counsel had an opportunity to be informed of the special grounds of error on which the appellant would rely. Much that is therein contained, in reference to the validity of the "Civil Commission," seems now to be superfluous, as the authority of the case of The Mechanics' Bank *v.* The Union Bank, 22 Wall., 276, appears to be acquiesced in, and particular considerations are brought forward to exempt this case from its operation. These will now be briefly noticed.

I.

The suggestions made in the brief of the opposite counsel, in regard to the supposed good faith of May and Kendig; to the alleged difficulties in the way of making payments by May; and to the pretended tender by Kendig's agent on the 23d of July, 1863, all seem to be immaterial and irrelevant.

All these go to the correctness of the decree rendered by the Commission, and are intended to show that it was erroneous, seeking thus to avoid its effect as an adjudication.

This is to concede to it only the force of a foreign judgment at the common law, the merits of which are reëxaminable whenever it is sought to be enforced by suit outside of the jurisdiction in which it was rendered. This cannot be done in the present case, for several reasons.

1. The merits of the case before the Commission, and the correctness of the decree, are not put in issue by the pleadings in this case. This could only have been done by the original bill, or by an amended or supplemental bill after the answer setting up the decree was filed.

2. The record of the Commission, contained in this record, does not purport to embody the evidence on which the decree was founded. It is not pretended that the proof of tender was before the Commission; for the deposition of Cook (p. 47) was not taken until 1867, and was then taken in a different cause, and is now in this record only by reason of an agreement of counsel, (p. 46,) that the depositions taken in Dean *v.* Nelson, *which are applicable to this case*, may be read *without retaking*. We deny the applicability of Cook's deposition in this case, because there is no issue made by the pleadings to which it is relevant. The fact of the tender alleged by Kendig in his answer, (pp. 31, 32,) was denied by Dean in his replication, (p. 36,) and it does not appear that there was any proof on the subject.

3. This is not a suit founded on the decree, for the purpose of enforcing it in another jurisdiction; but the proceedings are merely introduced as evidence of the title to property sold by virtue of it.

4. The decree is not a foreign judgment, and does not stand on that footing at all.

It is evident that the only question is whether the decree is absolutely void, so that no rights can be derived under it. There is no middle ground. "It is either a record, importing absolute verity, or mere waste paper."

Voorhees *v.* Bank U. S., 10 Peters, 475.

II.

So the adjudication by the Commission, that the mortgage relied on was a mortgage of the *shares of stock*, is conclusive, provided the tribunal had jurisdiction of the parties and of the cause of action.

Did it have such jurisdiction?

As to May, it is unnecessary to inquire whether there was such jurisdiction of his person as to uphold the judgment given against him for the amount of his two notes and interest. He does not complain. No attempt appears ever to have been made to enforce it against him; none is now made; and it is immaterial whether it be valid or void.

May was not a necessary party to the proceeding to foreclose the mortgage. He had parted with his entire interest to Kendig, who was the absolute owner of the stock, subject only to the rights of Dean, and who, therefore, was the only necessary party.

As to Kendig, the personal jurisdiction was complete. He was served with process, and he appeared in person and by counsel, and defended the suit on its merits.

The cause of action was clearly within the jurisdiction of the Commission. We do not locate it under the *fourth* of the "specially-enumerated powers," but under the *first* and *second*, and the concluding general clause. The Commission was organized "to hear and determine all complaints and suits instituted by loyal citizens of the United States, for (1) the collection of debts, (2) the enforcement of contracts, and, (omitting the third and fourth clauses,) (5) generally to perform such duties and exercise such powers as can be done by a court deriving its powers from military authority."

The suit of Dean against Kendig was a complaint or suit brought *to collect a debt* and to *enforce a contract*, and the

decree of the court as to the meaning and effect of the contract, the amount of the debt, and the property bound for its payment,—as, for instance, that the instrument in question was a mortgage of the shares of stock, and that these were liable to be sold for the payment of the debt,—was a decision of a question at issue in a cause of which it had full jurisdiction, and is therefore conclusive.

The argument of the opposing counsel, that this was in truth a mortgage of real estate only, and not of the stock, if sound, would only prove that the decision was erroneous. In either aspect, the jurisdiction to foreclose it was the same. To hold erroneously that it was either one or the other, would be no usurpation of jurisdiction, unless, indeed, upon the idea that a court has no jurisdiction to commit an error, and therefore that all erroneous judgments may be impeached collaterally.

That the military authority may, in time of war, create courts with such powers in civil matters, is not seriously disputed. It is so settled by the case of The Mechanics' Bank *v.* The Union Bank, before cited. This court declined to decide whether the necessary jurisdiction had been actually conferred upon the Provost Court in that case, because not a question upon which the judgment of the State court could be reviewed here. But if such jurisdiction could not have been lawfully conferred, it is fair to infer that the case would have been differently decided.

III.

It is further insisted, that the sale of the stock under the decree of the Commission was void, because it is not shown affirmatively that the decree was approved by the commanding general.

It will be observed that the order does not direct in what manner the decrees, &c., are to be reported, nor how the approval is to be expressed. Nor is it said that the action of the court shall not take effect until approved. The gen-

eral commanding was not a member of the court, and his acts could not be recorded as a part of the proceedings of the court. The decree entered of record is complete and perfect on its face, and, in this case, it concludes "all which is *finally* ordered, adjudged, and decreed by the court."

How, then, is the approval to be manifested? Can this court say that any particular form must be pursued? The act to be done is an act *in pais*, not a judicial act. It does not appear that the approval was usually, or ever, given in writing. It may have been done verbally, or it may have been the usage that only the *disapproval* should be expressed in writing.

At all events, we submit that the solemn judgment of a court, duly recorded, cannot be annulled, and titles derived under it made void, because a mere act *in pais*, subsequent to the judgment, was not shown to have been performed. The presumption that "*omnia rite esse acta*," peculiarly applicable to judicial proceedings, ought to prevail.

But the point was not made by pleading, nor does it appear to have been raised in the court below. These proceedings were set up by Dean in his answer, and their validity was not impeached by the bill, or by an amended bill. Counsel had no notice of the objection, and no opportunity to meet it. Under the circumstances, it is too late to raise it.

But we insist that it does sufficiently appear that the decree *was approved* by General Veatch. Kendig and his counsel were on the spot, watching the proceedings, and resisting them. It is not likely that they permitted the decree to be approved without opposition before the General; still less is it probable that they allowed the sale and subsequent proceedings to take place without the proper approval. If they did stand by and see Kendig's property sold, knowing that the decree had not been approved, he ought to be estopped from making the objection afterwards against the purchaser at the sale. He knew all the facts

then as well as now, and the presumption is irresistible that he knew that the decree had been properly approved.

Barclay appears as a regular purchaser at the sale, in good faith. The fact that he afterwards sold the stock to Dean, does not divest him of that character, or deprive Dean of the protection it should afford him.

But, further and more conclusively, the record contains two copies of the final decree of the Commission, one of them being embodied in the order of sale issued on the 16th of November, 1863 (pp. 41 to 44 of record). Upon this copy is indorsed these words:

"The decree of the Commission in this case was duly approved by Brigadier General James C. Veatch on the 14th day of November, 1863.

(Signed) JOHN C. GRIERSON, *Recorder*."

This is not inserted by way of *recital*, but purports to be a *copy* from an *original*, appearing "by the records of the Civil Commission." The probability is that it was accidentally omitted to be copied in the proper place, at the end of the decree, on page 41 of the record.

Now, in the absence of any showing as to the manner in which the evidence of the approval was usually preserved and recorded, this court will surely accept this entry as sufficient proof that the decree was duly reported and approved, before the order of sale was issued.

IV.

It is further argued that General Veatch, being only a brigadier general, and in command of a military district only, was not of sufficient rank, and did not occupy a sufficiently elevated and important position, to authorize him to establish courts within the limits of his command, without the previous authority of the President. It is said that he was not a general "in command of the conquering and occupying army," and not commissioned "to carry on the

war," and that the power to create courts can only be exercised by the "officer commanding the conquering army."

This argument would seem to assert that no officer but the general commanding the conquering army, *at the time of the conquest*, can exercise this admitted power to organize civil courts. But this restricts the power within too narrow limits, and imposes inconvenient conditions upon its exercise; for the General effecting the conquest, may have been immediately transferred to another sphere of action, and the conquered territory, for the purpose of occupation and government, may have been subdivided into districts, and placed under the command of other officers, before the necessity for civil courts had been developed.

As to the rank of the officer, it is believed that General Kearney was only a brigadier by *brevet* at the time of the conquest of New Mexico, and that the forces under his command were inferior in numbers to those commanded by General Veatch.

The district of Memphis was a military district, the limits of which are not shown, but which embraced a city containing then perhaps more than 50,000 inhabitants. It was a part of the territory then recently conquered from the insurgents, and held in firm military possession by the United States. General Veatch was in full command of this district. His duties were the same as those of General Butler in New Orleans, namely, to hold the territory securely for his government; to defend it against all enemies; "to carry on the war" against all who should assail or threaten it; and at the same time to defend and protect the inhabitants in the enjoyment of all their rights of person and property. The occupation was likely to be protracted, and it was precisely a case where the commander was loudly called upon to restore as far as possible the reign of law, and to provide some judicial machinery for the administration of justice among the people.

General Veatch responded to the demands of the occasion,

and created a tribunal which, with some changes of the judges and other officers, continued to discharge its functions, with great acceptance to the people, from April, 1863, until after the reorganization of the State and Federal courts, in the summer of 1865. The dignity of the occasion was quite adequate to vindicate his act.

V.

It is further asserted, against the validity of this Commission, that the act of General Veatch in organizing it was expressly repudiated by the President, that the power to create such tribunals was denied by the Judge Advocate General, and that the Secretary of War ordered it to be abolished.

In the first place, we insist that the papers printed in the appendix to the brief of the opposing counsel, cannot be looked at by this court at all, for any purpose. The object for which they are produced is to show that before the suit of Dean against Kendig was instituted before the Civil Commission, or at least before the final decree was rendered, the act of General Veatch, in organizing the Commission, had been disapproved and repudiated, and that the Secretary of War had ordered the Commission to be dissolved.

We contend that these are matters which ought to have been set up before the Commission itself, in the nature of a plea to its jurisdiction, and that the question was waived by answering to the merits, and going to trial thereon.

Or if this is not so, then we insist that when the decree of the Commission was set up by the answer in this cause, these matters ought to have been alleged by an amended bill, and the jurisdiction of the Commission to render the decree should have been thus assailed, and these documents introduced as evidence. Then the point would have been put in issue by the pleadings, and the evidence would have

been contained in the record, and Dean would have had an opportunity to meet it by counter-proof.

These papers are not in the record. They are now produced for the first time, as evidence, in this court, and they cannot be regarded.

But in the second place, if the court will now receive and look into them, we do not think they justify the conclusion the counsel seeks to draw from them.

It is absolutely certain that this Civil Commission never was abolished by the War Department, and that it continued to exercise its large jurisdiction in civil matters for more than two years, until it expired with the withdrawal of the authority that created it.

The order for its organization was issued April 25, 1863. The suit of Dean was brought September 1, and the decree rendered October 24, 1863. By reference to the petition of Dan Able, (p. 28 of the brief,) dated July 7, 1863, it is shown that he had been proceeded against before a *Military* Commission, and ordered to pay a large sum of money. He complains that this was unjust, and he asks a reference of the case to the *Civil Commission* now (then) in session in Memphis, having and exercising all the powers of a common law and chancery court, his prayer being to have the case fully and fairly tried before a civil tribunal, &c.

The letter of Able's attorney, accompanying his petition, and supporting it, says: "We have a civil court now organized as a Civil Commission, with three judges presiding, all of whom are civilians and good lawyers," before which he asks that Able's case may be tried. (P. 27 of brief.)

This petition was referred to the Judge Advocate General, and he reported that the "*Military* Commission" had no jurisdiction of the case, and as to the "Civil Commission," (while he admitted that its precise nature was unknown to him,) if it had been established in Memphis by virtue of *any military order*, it must be held to be an anom-

alous and irregular tribunal, entirely unauthorized by military law; and he recommended that all proceedings in the case against Able be arrested by the Secretary, and his money repaid him. (Pp. 25–27.)

This report was approved by the Secretary of War, and a telegraphic order, and a general order, 224, (p. 30 of brief,) were issued accordingly. These orders related entirely to the *Military* Commission before which the proceedings had taken place, and did not in any way affect the Civil Commission, except by the expression of the Judge Advocate General's opinion adverse to the right of the military authorities to create any civil tribunals whatever, in time of war, in the conquered territory.

The opinion of the same officer in Orgill's case, (p. 30 of brief,) shows that the action complained of was that of "a so-called civil court, *held by the Provost Marshal* at Memphis." There is no express reference to the "Civil Commission," but the recommendation is that not only this provost marshal's court, but "any other court or commission which has been instituted by the military authority in the district, for the purpose of passing upon civil cases, be ordered by the Secretary to be dissolved." This language is broad enough to embrace the Civil Commission, but it does not appear that it was intended to do so. The proceedings of the "*Military* Commission" had been before him for examination, and that was no doubt the other "court or commission" referred to. He states that "the wholly irregular and illegal character of the proceedings of *these courts*, [that is, of the courts which he recommends the Secretary to dissolve,] when assuming to determine questions of pecuniary liability, has been heretofore remarked upon in reports from this office." This shows that he was not speaking of the Civil Commission; for no complaint appears ever to have been made of the proceedings of that tribunal, and they had never been made the subject of the Judge Advocate General's animadversion.

When the Secretary referred the matter to the General in Chief to issue the proper order, it was no doubt with the same understanding. The order actually issued is not produced, nor does it appear that any order was ever issued, but it is fair to conclude that, if any order was issued, it was confined to the provost marshal's court and the Military Commission.

In no other way can the continued and unchallenged existence of the Civil Commission for nearly two years afterwards be accounted for. The final decree in the case now in question was actually rendered twenty-two days after the date of the last order of the Secretaay of War. It was approved by the commanding general on the 14th of November, forty-two days afterwards, and all the proceedings in the execution of it took place after the last date. It is absurd to suppose that all this was done in the face of an order from the Secretary of War dissolving the tribunal as one "unwarranted by law or usage."

But whether it was the intention to abolish the Civil Commission or not, certain it is that such intention was never carried out. No notice of it was ever given to the General, or to the persons composing the court. No complaint of their proceedings ever went up to any superior authority, and they were left in the quiet exercise of their judicial functions, adjudicating legal and equitable rights, and performing all the offices of a court of full jurisdiction in law and equity, in blissful ignorance of the speculative opinions of the Chief of the Bureau of Military Justice as to the legitimacy of their proceedings, and encouraged by the silence of their superiors to believe that they were in the path of public duty. In these circumstances, we submit that it will be conclusively presumed that the act of General Veatch in organizing this tribunal had the approbation of the President.

It need not be added, that the views of the Judge Advocate General in regard to the military power to create

civil tribunals, in the conditions existing at Memphis and New Orleans in 1862 and 1863, have not been adopted by this court. It is now settled, that such tribunals are not anomalous and irregular, but are warranted by law and usage. Indeed, they are a necessity, in cases of protracted military occupation, in time of war.

H. T. ELLETT, *for Appellee.*